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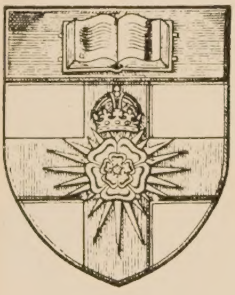

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Courts of Probate and Divorce.

REPORTED BY

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RICHARD SEARLE, BARRISTER-AT-LAW,

AND

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XXIX—XXXII VICTORIA.

The Right Hon. Lord Penzance.

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CASES

DETERMINED BY THE

COURT OF PROBATE

AND BY THE COURT FOR

DIVORCE AND MATRIMONIAL CAUSES,

IN AND AFTER

MICHAELMAS TERM, XXIX VICTORIA.

In the Goods of HAMPSON.

1865
Nov. 7.

Executor out of Jurisdiction—Limited Grant to Father and Guardian of Legatees —38 Geo. 3, c. 87; 20 & 21 Vict. c. 77, s. 74; 21 & 22 Vict. c. 95, s. 18.

The executor being out of the jurisdiction, the court made a grant of administration, with the will annexed, to the father and guardian of infant legatees, limited to the interest of those legatees in the unadministered estate, under the 38 Geo. 3, c. 87, and the 20 & 21 Vict. c. 77, s. 74, and the 21 & 22 Vict. c. 95, s. 18.

Edward Hampson died on the 21st day of July, 1856, leaving a will, dated the 12th of August, 1854, and two codicils thereto, dated, respectively, the 12th of April, 1856, and thereof appointed George De Vins Wade sole executor, who proved the will and codicils, in the Prerogative Court, on the 29th of August, 1856. A petition to the London Court of Bankruptcy for an adjudication in bankruptcy against George De Vins Wade, was filed and entered of record on the 21st of November, 1864, on which day he was duly adjudicated a bankrupt. On the 21st of December, 1864, an assignee of the bankrupt's estate and effects was chosen by the creditors, and such choice was afterwards confirmed by the acting commissioner of the Court. George De Vins Wade never surrendered himself to his bankruptcy, and the Court of Bankruptcy,

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on the 14th of February, 1865, caused him to be proclaimed an outlaw. In January, 1865, his name was, by order of the Court of Queen's Bench, struck off the roll of attorneys for his misconduct in certain money transactions. He has left the country, and is out of the jurisdiction of the courts of law and equity.

The testator, by his will, gave George De Vins Wade and Leonard Hampson Rudd the sum of 1200*l.* upon trust, that they, or the survivor of them, or the executors, administrators, or assigns of the survivor of them, should invest the same, in their or his names, in the purchase of 3*l.* per cent. consols; to hold the same in trust for any child or children of Charles Hibbert and Ann his wife, living at the time of the said testator's decease, to be equally divided between them. Leonard Hampson Rudd declined to act in the execution of the trust, and never acted therein in any manner. At the time of the decease of the testator, there were living seven children of Charles Hibbert and Ann his wife. Five of them have attained the respective ages of twenty-one years, four of whom have received their respective shares of the legacy of 1200*l.* Annie and Harriett Hibbert are still minors, under the age of twenty-one years. George De Vins Wade advanced, for Harry Hibbert, who attained his majority on the 16th of June, 1865, the sum of 112*l.* 11*s.* 2*d.*, and, for Annie Hibbert, the sum of 9*l.* 12*s.* 2*d.*, on account of their respective shares in the legacy, for their advancement in life. The principal sum of 392*l.* 4*s.* 3*d.*, together with an arrear of interest, remained due in respect of the legacy. George De Vins Wade did not invest the 1200*l.*, or any part thereof, in the purchase of consols, pursuant to the trusts of the said will. It was believed that, in or about the year 1858, he advanced the sum of 458*l.* 18*s.* 2*d.* out of the 1200*l.* to his brother, William Thomas Wade, on the security of his promissory note, such note being drawn out and expressed to be given to him as the executor of the testator, and that sum still remains due on such security. It was believed that the said George De Vins Wade had, since the note was given, advanced the difference between the principal amount due on it (458*l.* 18*s.* 2*d.*) and the principal amount (392*l.* 4*s.* 3*d.*) now due on the legacy of 1200*l.*, out of his own private moneys. But the whole of the sum of 458*l.* 18*s.* 2*d.*, and any arrear of interest due thereon, appeared to be due from

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George De Vins Wade or Thomas William Wade to the estate, inasmuch as George De Vins Wade charged William Thomas Wade interest at the rate of 5*l.* per cent. per annum on the sum of 458*l.* 18*s.* 2*d.*, and only allowed and paid interest to the legatees at the rate of 3*l.* per cent. per annum on the legacy of 1200*l.* By an order of the Court of Chancery, dated the 21st of April, 1865, made in the matter of the trustees of the will of the testator, and in the matter of the Bankrupt Law Consolidation Act, 1849, and in the matter of the Trustee Act, 1850, it was ordered that Charles Hibbert be appointed a new trustee of the will, so far as related to the said legacy of 1200*l.*, in substitution for George De Vins Wade. Charles Hibbert is the father and lawful and proper guardian of the said Annie Hibbert and Harriett Hibbert. With the exception of the outstanding shares of the legacy, the whole of the personal estate and effects of the testator had been duly administered according to the trusts of the will. Probate duty was paid, in respect of the whole of the legacy of 1200*l.*, on the taking out of the probate of the will. These facts were proved by affidavit.

Dr. Swabey moved for a grant of administration, with the will annexed, of the personal estate of Edward Hampson, deceased, limited to the interest of the legatees in the sum due on the promissory note, to Charles Hibbert, under the 38 Geo. 3, c. 87, and the 20 & 21 Vict. c. 77, s. 74, and the 21 & 22 Vict. c. 95, s. 18. He cited, *In the Goods of Collier, deceased* (1).

Motion granted.

(1) 2 Sw. & Tr. 444; 31 L. J. (P. M. & A.) 63. In that case, a limited grant was made to the personal representative of a legatee, the executor being out of the jurisdiction.

1865
Nov. 7.

IN THE GOODS OF WILLIAMS.

Will,—Execution—Position of Testator's Signature beside or opposite to the end of Will—15 *Vict. c.* 24, s. 1.

A will ended on the middle of the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and the signatures of the testator and the attesting witnesses were written on the third page, the signature of the testator being opposite to the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the will, and the signatures of the attesting witnesses being at the bottom of the attestation clause :—

Held, on motion, that the signature was so placed beside or opposite to the end of the will that it was apparent, on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will, and that the will was therefore entitled to probate under the 15 Vict. c. 24, s. 1.

JOSIAH WILLIAMS died on the 14th of December, 1864, leaving a will, dated the 3rd of November, 1863, whereof he appointed Peter Harrison, Thomas Kay, and Joseph Kay, executors. The will was written on the first and second sides of a folded sheet of foolscap paper. At the bottom of the first side a space of about a quarter of the side was left in blank. The will continued on the second side as follows :—

"And the remaining portion to be divided amongst the undermentioned

"Thomas Kay, Joseph Kay, Mary Smithers, Nancy Robinson, Sarah Allcock, Maria Newton, and Harriet Richardson, to share and share alike in their mother's portion. If any of the above nephews and nieces die before me, their children to receive their mother's portion, share and share alike. I do hereby nominate and appoint Peter Harrison, maltster, Weaverham, and Thomas Kay, farmer, Slingsby, and Joseph Kay, farmer, Weaverham, executors of this my last will and testament, revoking all former wills heretofore made by me, and doubting not but that they will take care to see the same justly performed, as my trust and confidence are in them reposed ; each of the said executors to receive two pounds to defray their expences in so doing."

These were the last words of the will, which ended in the middle of the second side of the sheet of paper. The remainder of the

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second side was left in blank. On the third side, and beginning about one-third of the page from the top, was written:—

"In witness whereof, I, the said Josiah Williams, the testator, have to this, my last will and testament, here set my hand and seal, JOSIAH WILLIAMS. L.S.

"The day and year first written,
signed, sealed, published,
and declared by the said
testator, Josiah Williams,
as and for his last will
and testament, in the presence
of us, who in his presence
and at his request, and in
the presence of each other,
have set our names as witnesses hereto,

WILLIAM ROBERTS. L.S.
JOHN ROBERTS." L.S.

The signature of the deceased on the third side was opposite the line, "I do hereby nominate and appoint," on the second side. The signatures of the attesting witnesses were opposite, but rather lower down than the last words of the will. The two attesting witnesses made affidavits that their signatures were genuine, but that they were unable to recollect the circumstances of the execution. Peter Harrison, one of the executors, and his wife, who were present at the execution, also made affidavits that the will was duly executed. Peter Harrison further deposed that he was the writer of the will, and that he had prepared it from instructions given by the testator; and with respect to the blank spaces left at the bottom of the first and second sides of the paper, and at the top of the third side thereof, that the will was in all respects in the same plight and condition as when written by him for the testator, and as when it was executed.

Dr. Spinks moved for probate of the will to the executors therein named. It is evident from the language of the concluding clause that the testator intended it to be the end of his will, although he left a blank space beneath it. The signature of the

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testator "is so placed beside or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will:" 15 Vict. c. 24, s. 1; and the execution is, therefore, good. He cited, *In the Goods of Wright*, (1) and *In the Goods of Jones*. (2)

SIR J. P. WILDE. I think that as the signature is opposite the concluding sentence of the will, the case falls within the act, and the will is entitled to probate.

Motion granted.

Nov. 14.

POWELL *v.* POWELL.

Pleading—Revocation of earliest Will by a later Will—Amendment—Particulars—Practice.

The defendant having traversed in the 1st plea the due execution of the will propounded, dated 1862, alleged in the 2nd plea the due execution by the deceased of a later will in 1864, at a time when he was of sound mind, &c.; and in the 3rd plea, that the will of 1862, howsoever executed, had been revoked by the later will; and in the 4th plea, that the will of 1864 had been destroyed by the deceased with the intention of revoking the same. The Court declined to strike out the 2nd plea, but directed it to be joined to the 3rd plea, so as to form with it one plea, striking out the words "howsoever executed" in the 3rd plea, and also directed the 4th plea to be struck out, reserving to the defendant leave to raise the question therein raised at the trial, if necessary. The Court refused to order the defendant to insert in the 3rd plea the name of the executors of the will of 1864, that being a matter for particulars.

THIS was an application to amend certain pleas filed by the defendant. The plaintiff propounded in a declaration the will of Walter Powell (deceased), dated the 3rd of March, 1862, as the executor named therein.

To the declaration the defendant filed four pleas:—1. A traverse of the due execution of the will propounded. 2. That subse-

(1) 34 L. J. (P. M. & A.) 104. In that case, the will filled two pages of a sheet of paper, so that no room was left beneath the end of it for the signatures of the testator and of the attesting witnesses, and they were written along the side of the will on the third page. The execution was held to be good.

(2) 34 L. J. (P. M. & A.) 41. In that case, the signatures of the attesting witnesses were written at the bottom of the will, and there was no room for the signature of the testator, which was written along the right hand side of the will. The execution was held to be good.

quently to the alleged execution of the said will, to wit, on the 29th day of March, 1864, the said deceased made a will dated the said 29th day of March, 1864, which, having been reduced into writing, was signed by the said deceased in the presence of two witnesses present at the same time, who subscribed the same in the presence of the said deceased, and that the said deceased was, at the time of the execution of the said will, of perfectly sound mind, memory, and understanding. 3. That the said alleged will, dated the 3rd day of March, 1862, was duly revoked by the said deceased by or by virtue of the said last-mentioned will, dated the 29th day of March, 1864. 4. That the said will, dated the 29th day of March, 1864, was, subsequently to the execution thereof, destroyed by the said deceased, with the intention of revoking the same.

Bayford, for the plaintiff, moved the court to direct the pleas to be amended by striking out the second and fourth pleas, and striking out the words "by virtue of" in the third plea, and by inserting therein the name of the executors of the alleged will of the 29th March, 1864. The second plea raised an immaterial issue, and was, although pleaded to the whole declaration, no answer to it, and consequently violated the well-established rule of pleading—that each plea pleaded to the declaration must be an answer to it. The fourth plea also raised an immaterial issue. He submitted also that the amendments mentioned ought to be made.

Dr. Tristram, contrà. The first objection would be met by putting the second and third pleas into one plea. The questions proposed to be raised by the second plea were material, for, in order to shew that a former will was revoked by a subsequent will, it must be shewn not only that it expressly, or by implication, revoked the former will, but also that it was duly executed by a capable testator. As to the fourth plea, it did no harm to the plaintiff. The defendant was desirous, in the event of setting aside the will of 1862, not to be driven to a second suit in order to establish an intestacy, by proving the revocation of the second will. This course is in accordance with the spirit of the rule.

SIR J. P. WILDE. The plaintiff asks for probate of one will. To

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which you answer that a subsequent will has been revoked. That cannot be a good plea.]

It is in the nature of a declaration, and, from the circumstances of the case, the common law rules of pleadings do not apply.

SIR J. P. WILDE. The questions raised in the second and third pleas taken together are material, though neither standing alone would be an answer to the declaration. They must, therefore, be formed into one plea, which will be good enough. The words "howsoever executed" in the third plea should be struck out. I do not see that there is any ambiguity in the use of the words "by, or by virtue of," in the third plea. If the plaintiff desires to ascertain the name of the executor of the will of 1864, he should make an application for particulars on this head. I think the fourth plea should be struck out, but I will take care that the defendant is not injured thereby at the trial; and I will then, if necessary, allow him to raise the question he proposes to raise by this plea. Costs of the motion to be costs in the cause.

Nov. 14.

IN THE GOODS OF THOMSON.

Will—Ambiguity—Parol Evidence—Mistake.

A testator duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth codicil confirmed the will and the four codicils. Parol evidence was admitted to explain the ambiguity of these codicils, and it was proved that the confirmation of the will and four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the will and the fourth codicil. Probate was granted, on motion, of the will and the fourth and fifth codicils only.

The fifth codicil appeared on the face of it to be executed on the 30th Aug., 1861, but the parol evidence admitted to explain its ambiguity, proved that it was in fact executed on the 30th August, 1865. The Court declined to alter the date appearing on the face of it, but directed probate of it to issue as having been executed on the 30th August, 1865.

ANDREW THOMSON, tanner, deceased, duly executed a will and codicil thereto, dated respectively the 12th of March, 1861, whereof he appointed his son, Edwin Wilson, sole executor. The material part of the codicil was as follows:—"I revoke the power

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in this my said will given to leave in the hands of my son Edward Wilson, or to be retained by him, unless with the consent of the daughters or daughter interested in the same, all or any portion of the shares or share of the valuation of my real and personal estate in and by my said will given to all or any of my said daughters. In all other respects I confirm my said will."

A second codicil dated the 11th of April, 1861, was as follows:—

"This is a codicil to the last will and testament of me Andrew Thomson, &c. Whereas, in and by my said will, I have charged my son Edward Wilson with the clothing, maintenance, and education of each of my daughters Margaret, Alice, and Phœbe, being under the age of eighteen years, until they respectively attain that age; now it is my will and mind that this provision, so far as the same affects my said daughter Phœbe, should be extended until she shall attain the age of twenty-one years, and to answer the expense of this further providing for my said daughter Phœbe, I order and direct that there shall be deducted from the one-fifth part of the amount of the valuation of my real and personal estate, in and by my said will, given to my said daughter Margaret, the sum of 30*l.*, and the like sum from the amount of such valuation in and by my said will given to my said daughter Alice, and it is my will and mind, and I hereby order and direct, that 20*l.* of the sums thus deducted shall, upon my said daughter Phœbe attaining the age of eighteen years, be yearly applied by my said son Edward Wilson, in consultation with Edmund Cockshutt and Richard Munday, in my said will named, in and towards the clothing, maintenance, and education of my said daughter Phœbe, until she attain the age of twenty-one years. In all other respects I confirm my said will, in witness," &c.

On the 18th of April, 1865, he executed the following codicil:—

"This is a third codicil to the last will and testament of me, Andrew Thomson, &c. Whereas I have, since the execution of my said will, made and executed two codicils to my said will, bearing date respectively the 12th day of March, 1861, and the 11th day of April, 1861. Now I do hereby entirely and absolutely revoke, annul, and make void, both of the said codicils, and all the provisions and clauses therein contained, And whereas I have, in and by my said will bequeathed a share and interest in the residue of my estate

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and effects unto my daughter Margaret. Now I do hereby revoke such bequest so far as the same relates to the four-fifth part of such share and interest, and I declare it to be my will and mind that such four-fifth part of the said share shall go to, and I hereby give and bequeath the same in augmentation of, and addition to, the share and interest bequeathed to my daughter Phœbe, by my said will; my reasons for making this alteration being, that I have expended a very considerable amount of money in giving to my said daughter Margaret an expensive education, which has enabled her to place herself in a position in which she will at all times be able to provide for herself a respectable livelihood; whereas the health of my youngest daughter is so precarious, that in all probability she will be unable to do so. And in all other respects, I confirm my said will. In witness," &c.

A fourth codicil, dated the 25th of April, 1865, was in the following words:—

"This is a codicil to the last will and testament of me, Andrew Thomson, &c. Whereas I have, since the execution of my said will, made and executed three codicils to my said will, bearing date respectively the 12th day of March, 1861, the 11th day of April, 1861, and the 18th day of April, 1865. Now I do hereby entirely and absolutely revoke, annul, and make void all of the said codicils, and all the provisions and clauses therein contained. And whereas I have, in and by my said will, bequeathed a share and interest in the residue of my estate and effects unto my daughter Margaret: Now, I do hereby revoke such bequest, so far as the same relates to one-fourth part of such share and interest. And I declare it to be my will and mind that such one-fourth part of the said share shall go to, and I hereby give and bequeath the same in augmentation of, and in addition to, the share and interest bequeathed to my daughter Phœbe by my said will. And, in all other respects I confirm my said will. In witness," &c.

A fifth codicil, appearing on the face of it to be dated 30th of August, 1861, but really executed on the 30th of August, 1865, was as follows:

"This is a fifth codicil to the last will and testament of me, Andrew Thomson, of, &c. Whereas I have by my said will, bearing date the 12th day of March, 1861, appointed my son, Edward

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Wilson Thompson, sole executor thereof; and I have thereby directed that Edmund Cockshutt, of Kendal, aforesaid, draper, and Richard Munday, of the firm of John C. Gale and Company, Liverpool, in the county of Lancaster, cotton factors, shall act in conjunction with and advise and assist my said son, Edward Wilson, in carrying out the trusts of my said will; and that upon any dispute arising in the execution of the trusts thereof, I have ordered that the same shall be referred to the said Edmund Cockshutt and Richard Munday, and directed that their decision should be final and conclusive. Now I do hereby request and appoint my friend, James Allen, of Kendal, draper, to act in conjunction with the said Edmund Cockshutt and Richard Munday. In all other respects I confirm my said will and four codicils. In witness whereof I have hereunto subscribed my name this thirtieth day of August, one thousand eight hundred and sixty-one."

The affidavit of C. Gardner Thompson, the solicitor who prepared the fifth codicil, stated that on the 30th of August, 1865, he received verbal instructions from the testator to prepare a fifth codicil, the object of which was simply to add the name of James Allen, of Kendal, to those of the other two gentlemen named in the will, as advisers of his son; that on his return to his office he instructed one of his clerks to prepare a draft of a codicil pursuant to the said instructions, which he immediately did; that the deponent settled the draft, the only alteration he made being in the last clause, which he settled to read, "In all other respects I confirm my said will and fourth codicil;" that he then gave the draft to another clerk to engross, and instructed two of his clerks to obtain the execution of it by the testator; that he did not read over the engrossment until after the death of the testator, which took place a few days afterwards; that he then found that the words "four codicils" had been substituted for the words "fourth codicil;" that he then referred to the draft and found that after he had settled it the letters "th" had been struck out after the figure 4, and that the letter "s" had been added to the word "codicil;" that he had made inquiries, but had been unable to obtain from his clerks any information as to the alteration; and that he fully understood the intention of the testator to be to revoke all the codicils except the fourth and fifth. The affidavit of W. F. Rawes, one of the clerks to C. G. Thompson, stated that he

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engrossed the second codicil in the month of August, 1865, and that he inadvertently and by mistake wrote the word "one" instead of the word "five" in the year of the date thereof. The affidavit of John Robinson, another clerk, one of the attesting witnesses to the said codicil, proved that it was executed on the 30th August, 1865.

Dr. Spinks moved for probate of the will and the fourth and fifth codicils.

SIR J. P. WILDE. There is sufficient ambiguity in the codicils to let in parol evidence to explain it, and on that evidence I will grant probate of the will and the fourth and fifth codicils only. I cannot alter the date of the fifth codicil; but I will order probate to issue in this form, that the deceased did, on the fifth day of August, 1865, duly execute that codicil, a fact of which I am well assured by the evidence before me. The affidavits must be registered.

Nov. 14.

JACKSON *v.* JACKSON AND JACKSON.

Administration—Dispensing with justifying Sureties—Receiver appointed by the Court of Chancery.

The Court declined to dispense with justifying sureties, although a receiver of the estate had been appointed by the Court of Chancery, in accordance with the prayer of a bill filed for that purpose, on the ground that it was not satisfied that the Court of Chancery would continue to have the management and control of the estate after the grant of administration had issued.

EDWARD JACKSON died on the 22nd of April, 1865, intestate leaving a widow, Elizabeth Jackson, and three infant children, surviving him. The deceased was possessed of personal estate, consisting of stock standing in his name in the Bank of England, viz. Consols, 21,917*l.* 6*s.* 8*d.*; Reduced Annuities, 4671*l.* 11*s.*; and New 3*l.* per Cent. Annuities, 4960*l.*; besides leasehold land and houses, cash, and household furniture of considerable value. Elizabeth Jackson applied for a grant of administration of the estate and effects of the deceased, and was met by a caveat, which was warned, and an appearance was entered by John Van, the husband of a sister of the deceased, as the next friend of the infant children. A declaration was then filed, but the opposition to the grant was

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withdrawn, and on the 18th of July, 1865, the judge ordered that the contentious proceedings be discontinued, the plaintiff, Elizabeth Jackson, undertaking to take out administration within fourteen days, and that the plaintiff give justifying security in the sum of 20,000*l.*, and exhibit a declaration instead of an inventory of the personal estate of the deceased, and that the plaintiff be at liberty to include two or more sureties in the administration bond, and that on the administration being completed, the costs of the defendant be paid out of the estate of the deceased. On the 20th of July, 1865, a bill in Chancery was filed by Thomas Ray, as the next friend of the infant children of the deceased, to which Elizabeth Jackson was made a defendant. The bill, after reciting the death of the deceased, and the amount of his property, the commencement of the suit in the Court of Probate, which was stated to be then pending, the order to take out administration, and to find justifying sureties, alleged that the said Elizabeth Jackson is wholly unable to find persons who are willing to become security for her to the extent required by the said order; that in consequence of such inability of the said Elizabeth Jackson, and during the pending of the said suit, no letters of administration can be granted, and there will be no person entitled to receive the assets of the intestate. The prayer was for the appointment of a receiver, and of a guardian or guardians to the plaintiffs, and for an inquiry as to a proper allowance for the past and future maintenance of the plaintiffs.

Dr. Swabey moved to rescind so much of the order of the 18th of July, 1865, as required the sureties to justify. The widow is unable to obtain sureties, and the estate will be quite safe if it is administered under the order of the Court of Chancery. He referred to *Cleverey* v. *Gladdish*. (1) No one else is suggested who is able and willing to take the grant.

(1) 2 Sw. & Tr. 335; 31 L. J. (P. M. & A.) 53. In that case, the property had been transferred to the Accountant-General of the Court of Chancery, and would be administered by that court, and the other parties interested consented to the application of the administratrix to dispense with sureties. Sir C. Cresswell, in granting the motion, said: "The property having been transferred to the Accountant-General of the Court of Chancery, no risk can accrue to it by my dispensing with the sureties." See also In the Goods of De la Farque, 2 Sw. & Tr. 631; 31 L. J. (P. M. & A.) 199. The admi-

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Dr. Spinks, for the infant children, opposed the motion. The bill in Chancery is a collusive proceeding, the nominal next friend of the infants who files it being a person nominated by the widow, and the solicitor for the plaintiffs being the same solicitor who appears for the widow in this court. If the motion is granted, the widow, who has the control of the Chancery suit, may obtain an order by consent terminating the suit, and may then obtain possession of the property, above 30,000*l.* in value, under the grant of administration, without giving security.

SIR J. P. WILDE. I think this application cannot be granted. The Court made the order for administration in the usual form, requiring the widow to find sureties as to the two-thirds of the property belonging to the children. I am now asked to vary that order by dispensing with justifying sureties, on the grounds, first, that she has a difficulty in finding sureties; secondly, that a bill has been filed in Chancery for the appointment of a receiver, the present plaintiff being made a defendant. In accordance with the prayer of that bill, the Court of Chancery has appointed a receiver, upon the supposition that there is a suit pending in this Court, which is not now the fact. The receiver has, no doubt, given security commensurate with the duties he has to discharge, but he will have to do no more than collect the outstanding estate, and receive the rents and dividends. It is said that the appointment of a receiver should dispense with the necessity of requiring sureties from the widow, should she take the grant, as the property will be in the hands of the Court of Chancery. But it is by no means clear to me that when the Court of Chancery appoints a receiver for a temporary purpose whilst a suit is pending, it will continue to deal with the fund in any way when the suit is at an end. It is suggested that, if the application is granted, a supplemental bill may be filed for the appointment of a receiver to take charge of the estate. But surely it is too much to ask the Court to dispense with proper security, on the ground that, as soon as

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nistrator was in a state of great poverty, and unable to find sureties. The fund was in the Court of Chancery, and the administrator was about to petition the Court for payment of it to him. Sir C. Cresswell required evidence that the administrator was entitled, in his own right, to the whole fund, and, on that evidence being produced, dispensed with sureties.

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the grant is obtained, proceedings will be taken in Chancery for the appointment of a receiver. I refuse the application; but if, hereafter, the matter should, as suggested, come to a dead lock, and nothing can be done, I will consider what course can be taken for the purpose of getting the estate administered.

Motion rejected.

IN THE GOODS OF JOHN GEORGE BEAVAN.

Nov. 21.

*Administration—Seaman's Wages—Bastard—Rights of Crown—*11 *Geo.* 4, *c.* 20.

Where a seaman died a bachelor, a bastard, and intestate, leaving a sum due for wages, as well as other personal estate, the Court declined to decree a general grant of administration of his personal estate to the solicitor for the Treasury (the provisions of 11 Geo. 4, c. 20 not having been complied with), but decreed a grant save and except the deceased's pay and prize-money.

JOHN GEORGE BEAVAN, late a seaman belonging to Her Majesty's ship *Egmont*, died at sea on the 10th of October, 1864, a bachelor, a bastard, and intestate. There was a sum of 31*l.* 18*s.* 3*d.* due to his estate for arrears of pay, and there was also a sum of 354*l.* 15*s.* 5*d.* standing to his credit in the bank of the London and Brazilian Bank at Rio.

On the 30th of August, 1865, a motion was made before the Registrars for a general grant of administration of the personal estate of the deceased to be made to the Solicitor for the Treasury on the usual warrant, &c., but the Registrars declined to accede to the motion, on the ground that the certificate from the Inspector of Seamen's Wills had not been produced, in compliance with the provisions of 11 Geo. 4, c. 20, s. 56, but offered to make a decree for a grant of administration, save and except pay and prize money.

The Queen's Advocate (*Sir R. Phillimore*) now moved the Court for a general grant. He submitted that the sovereign not being named in 11 Geo. 4, c. 20, was not bound by that act, on the general rule "that the sovereign is not bound by any act of parliament, unless expressly named therein."

SIR J. P. WILDE. I cannot make a general grant. By section 60 of 11 Geo. 4, c. 20, it is enacted, "That if any Proctor, Registrar, or other officer of any Ecclesiastical Court, shall deliver, or cause

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to be delivered, any letters of administration to any other person than the Treasurer of the Navy, or the said Inspector, in the manner directed by this act, such proctor or other officer so offending shall, for every such offence, forfeit 100*l.*" Again, by section 62, any Registrar of any Ecclesiastical Court who shall knowingly aid in procuring letters of administration whereby any person may be enabled to obtain any wages, pay, prize money, &c., of any petty officer or seaman, otherwise than in the manner prescribed by that act, such registrar is liable to a penalty of 500*l.* You have not complied with the provisions of this act, and if I were to make a general grant, the Registrars of the Court would run the risk of incurring the penalties mentioned. This I cannot allow them to do. You may take a grant, save and except the pay and prize money.

Decree accordingly.

Nov. 28.

IN THE GOODS OF DANIEL SAUNDERS.

Seaman's Will—29 *Car.* 2, *c.* 3, *s.* 23; 1 *Vict. c.* 26, *s.* 11—*Surgeon in the Navy*—*Will made on a Passenger Ship.*

A surgeon in the navy was invalided at a foreign station, and wrote a letter at sea on board a steam-ship, on which he was a passenger homewards, containing directions as to the manner in which he wished his property to be disposed of:—

Held, first, that a surgeon in the navy was a mariner or seaman within the provision contained in 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, exempting mariners or seamen, being at sea, from making formal wills.

Secondly, that although the deceased was not on duty at the date of the letter, yet, as he was returning from service, this will was entitled to probate, as made at sea.

THIS was an application for probate of the will of Daniel Saunders, late a surgeon in her Majesty's navy, as contained in the following letter, written by the deceased at sea, whilst a passenger on board the Peninsular and Oriental Company's steamer "Cadiz," on a voyage from Shanghae to Hongkong:—

"P. & O. Steamer 'Cadiz,' 12 hours from Hongkong, China,
"June, 1865.

"MY DEAR GEORGE,

"I am very ill, and am daily getting more exhausted, so I endeavour to write my last wishes. I was invalided at Yokohama,

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June 8, 1865, for disease of the liver of four months' standing, and sent home overland for the preservation of my life. The small note contains a cheque for 396*l.*, &c., which I wish to be equally divided between my dear mother, three sisters, and yourself. There is also in the funds some 1200*l.* belonging to me. Mr. Lawrence has the whole management of this, and you can write to him and ask him to send the whole amount to you, which I wish to be equally divided between you all. There is also money in my portmanteau in the leather bag, and there will be some residue of pay due to me from the Admiralty. Mr. Lawrence will assist you, I dare say. I wish to leave Mr. Lawrence 40*l.* to purchase a mourning-ring in my memory. This is all I am able to write at present. God bless you all; amen. My love to all. I am completely exhausted. A long farewell to you all, my dear relatives, and may the Lord bless and protect you all is my last wish in this world; and when I do depart, may the Lord receive my soul is my fervent prayer.—I am, your loving brother,

"At sea, June 25, 1865. "D. SAUNDERS, R.N.
"Near Hongkong, China."

The deceased died on the 4th of July, 1865, at sea, whilst on board the steamship "Ottawa," on a voyage from Hongkong to Bombay, and at the time of his writing the letter, and of his death, had left the ship in which he had been serving, and was on his way home on sick leave.

Dr. Spinks, moved for probate of the above letter. The facts of the case raised two questions: First, whether a surgeon in the navy was a mariner or seaman within the exemption contained in the Statute of Frauds, 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, in favour of wills "made by any soldier being in actual military service, or by any mariner or seaman being at sea." It had been held that a purser of a man-of-war came within the description of a mariner or seaman: *In the Goods of Richard Hayes*,(1) where Sir H. Jenner referred to a decision of Sir William Wynne, reported in a manuscript note, "that it was the inclination of his mind to hold that the term mariner or seaman included the whole profession, because he did not know where to stop." So, also, *In the*

(1) 2 Curt. 338.

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Goods of Donaldson, (1) it had been held that a surgeon in the East India Company's service came within the term of a soldier, as used in the above statutes. He, therefore, submitted that on principle and precedent a surgeon in the navy was a seaman or mariner within the terms of the act. Secondly, it might be suggested that although the will was made at sea, yet that the deceased, at its date, was not at sea in his capacity of a surgeon of the navy, but merely as a passenger. But, *In the Goods of E. J. Lay* (2), probate had been granted to a seaman's will, which had been made on shore after he had met with an accident; and in *Herbert* v. *Herbert* (3), where the deceased made his will whilst on his way from one regiment to join another, he was treated as still being in actual military service, and entitled to the privilege of making a soldier's will.

SIR J. P. WILDE. I think this paper is testamentary; and I also think that the language is such as to create the deceased's brother executor according to the tenor. Then comes the question—whether the paper is so executed as to be entitled to probate. If it is within the exception in the Wills Act, it is properly executed; if it is not within that exception, it is not properly executed. The authorities cited sufficiently establish that a surgeon, as being part of our naval service, is a seaman within the act; and I should hold he was so, for the reason assigned by Sir William Wynne, that unless the term seaman or mariner included the whole profession, I should not know where to stop. I could not attempt to draw any line across so large a service. If he was a seaman, the only remaining question is—whether, at the time he made the will, he was at sea within the meaning of the statute. Now he was a naval surgeon, and had been on duty at a foreign station, and was on his way home from such station on sick leave, when he made this will. Having got so far, I think I am justified in holding that he must be considered to have been, at the date of this will, a seaman at sea. For, without going so far as to say that every man who is a seaman by profession is entitled, if he is at sea on some occasion wholly dissociated from his profes-

(1) 2 Curt. 386. (2) 2 Curt. 375.
(3) Deane's Rep. 11.

sion, to the benefit of the statute, I am justified in holding that the deceased, although he was not actually on duty as a naval surgeon, yet as he was returning home invalided from such service at the time when the will was made, was at sea within the meaning of the statute.

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IN THE GOODS OF DANIEL SAUNDERS.

IN THE GOODS OF ELIZABETH WATKINS, WIDOW.

Dec. 5.

Will—Incorporation—Reference.

A testatrix made a will contained on three pages of a foolscap sheet. The first page only, which contained a formal beginning and ending, was duly executed. The dispositive part on this page was in these words: "I do hereby bequeath the following sums to my sons and daughters hereunder named, and I declare the undermentioned sons and daughters to be my executors." At the bottom of the second page there was a specific bequest to one daughter by name, and a bequest of her goods and chattels to her children generally, and not by name. At the top of the third page there was a specific bequest of her money to her daughter by name. The second page was written in September, 1861, and the third page was written, by one of the attesting witnesses, immediately before the execution of the first page:—

Held, that the testatrix did not, in the first page of the will, refer with such distinctness to a paper then in existence as to entitle pages two and three to probate.

ELIZABETH WATKINS, widow, died on the 6th of May, 1865, leaving property of about the value of 100*l*. She left a will contained on three pages of a foolscap sheet. Page 1, which contained no disposition of property, except by reference, and no appointment of executors, except also by reference, was only executed by the deceased on the 2nd of June, 1863. Page 2, which contained the names of certain intended legatees, the amount of their legacies being left in blank, and at the bottom a bequest in favour of her children was written on the 1st of September, 1861, and the top of page 3 was written by John Saxley, one of the attesting witnesses to page 1, by the request of the deceased immediately before the execution of page 1.

The paper was as follows:—

Page 1.—"This is the last will and testament of me, Elizabeth Watkins, of the parish of Bexley, in the county of Kent, widow. I do hereby bequeath the following sums to my sons and daughters hereunder named, and I declare the undermentioned sons and

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IN THE GOODS OF ELIZABETH WATKINS.

daughters to be my executors, and I declare this to be my last will and testament, in witness whereof I have hereunto set my hand, this second day of June, one thousand eight hundred and sixty-three.

"Signed, published, and declared, &c.

"Witnesses. "JOHN SAXLEY, Grocer, Bexley.

"JOSEPH GAMMON, Victualler, Bexley."

Page 2, which contained the names of certain legatees, with the amounts of the legacies in blank, ended :—

"To Anne Watkins I give my feather bed, two pillows, and a bolster, three best blankets, four linen sheets, four pillow cases, a knitted counterpane, and knitted tablecover; also a gold finger ring set with six pearls and a representation of a death's head in glass. I also wish it to be understood the cruet-stand, ewer, extra pepper-caster, and two salt spoons are already the property of my daughter Anne; all the remainder of my goods and chattels I wish to be equally divided amongst my other children.

"E. WATKINS, first September, 1861, witness to the signature,

"THOMAS GODDARD."

Page 3 began :—

"And it is my particular request that, after my funeral expenses and just debts are all paid, whatever money may remain (if any), may be given to my youngest daughter, Ann Watkins, in consideration for the great care and attention to me during the closing time of my life."

Dr. Tristram moved for probate of the whole testamentary paper, and submitted that page 1 contained a sufficient reference to pages 2 and 3 to incorporate them. He cited *In the Goods of Almosnino.* (1) The deceased clearly did not intend to die intestate, which she will have done if the Court rejects the motion.

SIR J. P. WILDE. Before this motion can be granted, two propositions must be established, neither of which can be established in this case. First, it must be made manifest, that the testatrix in the executed paper referred to some papers then in existence; and next, that the papers in question are beyond all doubt the papers referred to. The testatrix says she wishes to bequeath the

(1) 1 Sw. & Tr. 508; 6 Jur. N.S. 302

following sums to her sons and daughters "hereunder" named, and she declares the "undermentioned" sons and daughters to be her executors. There is nothing in that clause inconsistent with the idea that she intended to fill in the names of the objects of her bounty at a subsequent time, which is no unusual occurrence. The will, therefore, does not refer with such distinctness to a paper in existence at the time when it was executed as to entitle such paper to probate. But if it did, a second question might be raised, whether these other sheets answer the description in the will of "hereunder named." The application must be refused.

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In the Goods of Elizabeth Watkins.

Motion rejected.

In the Goods of BAYLIS.

Dec. 5.

Executor according to the tenor.

A testator by the first clause of his will directed his debts and funeral and testamentary expenses to be paid, and then gave all his personal estate to certain persons on trust, to convert into money, get in and receive it in such manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture which he gave to one of his daughters:—

Held, that the trustees were executors according to the tenor.

Henry Baylis, deceased, left a will, dated the 11th February, 1865, in the following terms:—"This is the last will and testament of me, Henry Baylis, of &c. I direct that all my just debts, funeral and testamentary expenses, be duly paid and satisfied as soon as conveniently may be after my decease. I give, devise, and bequeath unto my nephew, John Hemming, of &c., and my sons, Thomas and Henry Baylis, of &c., their heirs, executors, and administrators, all my personal estate, wheresoever and whatsoever, whereof I may die seised or possessed, interested in, and entitled unto, upon trust that they, the said trustees, the survivor or survivors of them, or the executors or administrators of such survivor do and shall, as soon as may be after my decease, convert into money, get in and receive my said personal estate in such manner as they shall deem expedient, either by valuation or by public auction, and divide the money produced from my said personal estate equally amongst my children, William I. Baylis, John Baylis, Thomas Baylis, and Sarah Baylis, share and share

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IN THE GOODS OF BAYLIS.

alike, except that I bequeath to my said daughter Sarah the whole of the furniture in the rooms over the kitchen, for her kindness and attention to me, independent of her share before stated. In witness," &c.

Dr. Spinks, moved for probate of this will to J. Hemming and T. and H. Baylis, as executors according to the tenor. A general power is conferred on them to convert the estate into money; and although they are called trustees, the duties they have to perform are those of executors. The legacy to the daughter of the furniture is not an exception from the general gift of the estate, but an exception from the direction to divide the property share and share alike. He cited *Williams on Executors.* (1) *In the Goods of Jones* (2) is a distinguishable case.

SIR J. P. WILDE. The testator appoints certain persons trustees, and directs that, as soon as may be after his decease, they shall convert into money, get in and receive his personal estate in such manner as they shall deem expedient, and that, having got it in and received it, they shall divide the money produced from it equally amongst his children. But it is obvious that before that division can take place, the first clause of the will, "I direct that all my just debts, funeral and testamentary expenses, be duly paid," must be complied with. The result is, that the persons appointed trustees are to get in and receive the whole estate, to pay the debts, and to divide the residue. Now that is the very office of an executor, and therefore it is clear that the trustees are executors according to the tenor. The case is clearly distinguishable from *In the Goods of Jones.* (2) There would have been nothing inconsistent with the clause appointing a trustee in that case that some other person should have been appointed executor. T. Jones was not in any way authorized to receive or pay the debts of the testator, or to get in the personal estate, but was merely a legatee of certain property of which he was directed to dispose in a certain way. This distinction was clearly pointed out by the late Judge.

Motion granted.

(1) Pt. I. Bk. III. Ch. II.
(2) 2 Sw. & Tr. 155; 31 Law J. (P. M. & A.) 199.

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Nov. 7.

RYVES AND RYVES *v.* THE ATTORNEY-GENERAL.

Legitimacy Declaration Act, 1858—*Practice—Trial by jury—Commission to examine witnesses abroad.*

The Court cannot make an order for the trial by a jury of a petition presented under the Legitimacy Declaration Act, 1858, unless there is some issue for the jury. Where the Attorney-General had filed an answer to such a petition, which did not traverse the allegations contained in it, and no other answer to it had been filed, the Court refused to order it to be tried by a jury until the Attorney-General had amended his answer by inserting a traverse and issue had been joined.

When a motion is made for an order for a commission to examine witnesses abroad, in a suit for a declaration of legitimacy, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine.

THIS was a petition by Lavinia Jannetta Horton Ryves and William Henry Ryves, her son, under the Legitimacy Declaration Act, 1858, for a declaration that her mother, his grandmother, was the legitimate daughter of the Duke of Cumberland and of Olive Wilmot. The Attorney-General had been cited to see proceedings, and had filed the following answer:—

"In answer to the said petition, her Majesty's Attorney-General says as follows as to all and singular the matters and things in the said petition contained:—1. I leave the said petitioners to make such proof thereof as they shall be enabled. 2. I claim, on behalf of her Majesty the Queen, all such right and interest as she shall appear to have in the premises or in any matter arising out of the proceedings upon the said petition. Wherefore I pray that your lordships will take care of the rights and interests of her Majesty in the matter of the said petition, and in any matters arising out of the proceedings upon the said petition."

Walter Smith, for the petitioner, moved for an order that the case might be tried by a special jury.

[SIR J. P. WILDE. There is no issue for the jury. Is not the answer in an unusual form?]

R. Bourke, for the Attorney-General.—I drew the answer in nearly the same form as in *Shedden* v. *Patrick*, (1) which I settled under the direction of the then Attorney-General. The difficulty in traversing the petition is that the Attorney-General has no

(1) Sw. & Tr. 170; 30 L. J. (P.M. & A.) 217.

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means of obtaining instructions as to the truth or untruth of the allegations contained in it. I do not object to have the case tried by a special jury.

The JUDGE ORDINARY. I think the proper course will be for the Attorney-General to file an answer, formally traversing the allegations in the petition, there will then be an issue, and the cause can be tried by a jury. I will give the Attorney-General leave to amend the answer by traversing the allegations in the petition; and on that amendment being made, and issue being joined, I will order the cause to be tried by a special jury.

Walter Smith also moved for a commission to examine witnesses in France.

The JUDGE ORDINARY. Your affidavit does not state the names of the witnesses you propose to examine. Upon an affidavit being filed supplying that omission, I will order a commission to issue. The Attorney-General will have leave to join in the commission.

[*Nov.* 7.

HINDMARSH *v.* HINDMARSH AND HUSSEY.

Practice—Leave to appear and answer—Confrontation.

A respondent was allowed to appear and answer, after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the witnesses for the petitioner, for the purpose of being identified.

Dr. Spinks moved that the respondent in a suit for dissolution of marriage which was set down for trial, might have leave to appear and file an answer traversing the allegations in the petition, after the time for entering an appearance had expired.

Tapping, for the petitioner. I do not oppose the motion, but I ask the Court to make it a condition that the respondent shall allow herself to be confronted with the petitioner's witnesses for the purpose of being identified.

THE JUDGE ORDINARY. I think that is reasonable. Let the respondent appear and answer within three days, on condition that she makes an appointment with the petitioner's solicitor, a reasonable time before the trial, for the purpose of being confronted with the witnesses.

WHITMORE *v.* WHITMORE AND BRETTELL. 1865 *Nov.* 14.

Dissolution—Petition dismissed—Co-respondent's costs.

In a suit by a husband for dissolution, the jury were discharged without giving a verdict; the petitioner did not go to a second trial, and the petition was dismissed. There was no evidence connecting the co-respondent with the respondent, except that of two witnesses, who swore to acts of adultery, but whose evidence did not satisfy the jury that adultery had been committed. The Court condemned the petitioner in the co-respondent's costs.

THIS was a petition by a husband for a dissolution of marriage on the ground of adultery. The respondent and the co-respondent denied the charge. The cause was tried before the Judge Ordinary by a jury, and the jury were discharged without giving a verdict. The cause was again set down for trial, but the petitioner did not proceed with it, and it was struck out. The petition was subsequently dismissed. The wife had presented a cross petition, which was tried before the Judge Ordinary by a jury, and a decree *nisi* was pronounced. The Queen's Proctor had since interfered, to shew cause against that decree being made absolute.

Dr. Spinks moved that the petitioner in the husband's suit might be condemned in the costs of the co-respondent.

Dr. Wambey for the petitioner.—The co-respondent has not been acquitted of the charge of adultery, and he is not entitled to his costs. *Bancroft v. Bancroft and Rumney.* (1) At any rate, the Court should make no order until the result of the Queen's Proctor's intervention in the wife's suit is known.

THE JUDGE ORDINARY. The question of costs is entirely in the discretion of the Court, and the order must depend on the particular circumstances of each case. This case is very different from the one cited. Rumney was proved to have been guilty of such misconduct as justified the petitioner in making him a co-respondent, although he was not found guilty of adultery, and it was proper that he should not be allowed his costs. But the case against Brettell rested upon two witnesses of doubtful credibility,

(1) 34 L. J. (P. M. & A.) 144.

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who swore to acts of adultery, and there was no independent testimony to connect him with the respondent. The jury had a difficulty in believing the evidence of those two witnesses, and I am not at all surprised at it. I think Brettell is entitled to his costs, including those of this application.

Nov. 14.

COGHILL *v.* COGHILL AND LAURIERO.

Practice—Endorsement of service on citation—Rule 13.

A citation cannot be filed in the Registry without an endorsement thereon of personal service, as required by the Rule 13; but the Court can dispense with that rule, and direct the citation to be filed notwithstanding the absence of such endorsement.

THIS was a petition by a husband for dissolution of marriage. The petition originally contained a claim for damages, but on the motion of the petitioner the Court allowed the claim to be struck out.

Dr. Spinks, for the petitioner.—The co-respondent is a foreigner, and out of the jurisdiction. The citation was served on him at Shanghai. The citation has been returned; but the officers in Registry have refused to receive it, because there is no endorsement of service on it, as required by the 13th Rule. (1) There is a proper affidavit of service, and the petitioner wishes to avoid the delay and expense of having it re-served at Shanghai on account of the informality.

THE JUDGE ORDINARY. The officers in the Registry were quite right to refuse to receive it without the order of the Court. But I think it is unnecessary to re-serve it at Shanghai and I order it to be filed.

(1) "After personal service of citation has been effected, the citation, with the certificate of service endorsed thereon, shall be forthwith returned into, and filed in, the Registry."

WATSON *v.* THE ATTORNEY-GENERAL AND COWEN. 1865 *Nov.* 14.

Practice—Legitimacy Declaration Act—Divorce Rules—Rule 45*—Motion for New Trial.*

The 45th Divorce Rule, which directs that every application for a new trial, in respect of causes tried before a jury, is to be lodged in the Registry within one month from the day on which the cause was tried, does not apply to a motion for the new trial of issues in a suit for a declaration of legitimacy, which have been tried at the assizes.

THIS was a petition under the Legitimacy Declaration Act, 1858. Margaret Cowen, one of the parties cited, pleaded a traverse of the allegations in the petition, and issue having been joined, those issues were tried, under an order of the Court, by a jury, at the last assizes for Lancaster, and a verdict was found for the petitioner.

Temple, Q.C., for the respondent Cowen, applied for leave to move for a rule *nisi* for a new trial. A question had been raised whether such a motion could be made, no notice having been given of the application within a month of the trial.

W. G. Harrison, contrà.—He referred to section 4 of the Legitimacy Declaration Act, and the 45th of the Rules and Orders of 1858, framed under the 20 & 21 Vict. c. 85. That rule directs "'that every application for a new trial, in respect of causes tried before a jury, is to be lodged in the Registry within a month from the day on which the cause was tried." There is no reason for relieving the plaintiff from the consequences of having failed to comply with that rule. He cited *Chitty's Archbold's Practice* (1); *Kirkham v. Marter* (2).

THE JUDGE ORDINARY. If there is a stringent general rule which precludes the respondent from making this application, there is no reason for making an exception to that rule in her favour, but I think no such general rule exists. The real state of the case is this: In 1858 the Legitimacy Declaration Act was passed, and the 4th section enacted that "all the provisions of the

(1) P. 1523, 11th ed. (2) 1 Chit. Rep. 382.

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act of last session, cap. 85, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before parliament of rules and regulations concerning the practice and procedure under that act, and fixing the fees payable upon proceedings before the court, shall extend to applications and proceedings in the said court under this act, as if the same had been authorized by the said act of the last session." A set of rules has been framed under the Divorce Act, many of which are quite inapplicable to proceedings under the Legitimacy Declaration Act. Then by a rule, dated 11th July, 1859, these rules are, "so far as the same may be applicable," extended and applied to proceedings under the act in question. Now, there is a material difference in the way in which questions of fact may be and are tried under the two acts, for, practically, all trials by jury under the Divorce Act take place in this court, whereas trials by jury under the Legitimacy Declaration Act sometimes take place at the assizes. And it would be straining the construction of the 4th section, and of these rules, very much to press against the respondent in this case the 45th divorce rule, which was intended to apply to issues tried in this Court, and not to issues tried at the assizes. There has been no delay by reason of the non-compliance with the rule, because if the application had been lodged in the registry within a month of the trial, the case would not have been more forward than it is now, for this is only the second motion day in term. I therefore grant leave to the respondent to move for a rule *nisi* for a new trial, on Tuesday next.

WILLIAMS *v.* WILLIAMS AND PADFIELD.

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Nov. 22.

Dissolution of Marriage—Confessions of Respondent and Co-respondent uncorroborated by other evidence of Adultery.

In a suit for dissolution of marriage, the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent. The Court being satisfied, from the circumstances under which these admissions were made, and the conduct of the respondent at the time when they were made and subsequently, that they were genuine, and that there was no reasonable ground to suspect collusion, pronounced a decree *nisi*, with costs against the co-respondent.

THIS was a petition by a husband for a dissolution of marriage.

There was no appearance by the respondent or the co-respondent, and the petition was tried by oral evidence before the Judge Ordinary. It was proved that the marriage was in July, 1856; that a few years after it had taken place, the petitioner and the respondent went to live at Chantry in Somerset, where the petitioner held the situation of organist of the church, and taught music; that their house was opposite the house occupied by the family of the co-respondent, who was a farmer; and that the two families became intimate and visited at each other's houses. On the 9th of July, 1863, Mrs. Padfield, who suspected that her son George was carrying on an improper intercourse with Mrs. Williams, taxed him with it, and he did not deny it. She then sent for Mrs. Williams, and taxed her with it: Mrs. Williams confessed it and fell on her knees, and asked that it might be concealed from her husband. Mrs. Padfield said she should tell Mr. Williams, and Mrs. Williams then went back to her house, packed up her things, and went away by the railway, before her husband returned from business, to her mother at Southampton. When Mr. Williams returned home, Mrs. Padfield communicated to him what had taken place. On the following day, the 10th of July, Mrs. Williams wrote to her husband a repentant letter, and in that and in several other letters, which were put in evidence, she begged to be forgiven, and plainly acknowledged her guilt. There was no evidence of adultery except these confessions.

Dr. Spinks for the petitioner.—The circumstances under which

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the repeated confessions of the wife were made entirely remove all suspicion of collusion, and if the Court believes them to be genuine it is bound to act upon them. He cited *Robinson* v. *Robinson* and *Lane*. (1)

(1) 1 Sw. & Tr. 393. 29 L. J. (P. M. & A.) 179. In that case the evidence of adultery consisted of extracts from certain diaries written by the respondent. The cause was tried before the full Court, Cockburn, C.J., Wightman, J., and Cresswell, J.O. Judgment was delivered by Cockburn, C.J., who made the following observations respecting admissions of adultery unsupported by other evidence:—

"Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this Court had been a court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this Court is not a court of ecclesiastical jurisdiction, nor bound in cases of divorce *à vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admission of a wife, unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind; the more so as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as, from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy; secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act, has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubts of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present." (5 Jur. N.S. 392, 393)

The Court, however, was not satisfied that the extracts from the diaries amounted to a confession of adultery, and dismissed the petition.

(1) 1 Sw. & Tr. 392. 5 Jur. N.S. 392.

The JUDGE ORDINARY. The case cited is an authority for the proposition that the Court may act on the admissions of the wife although they are not supported by any other evidence. But I entirely concur with the observations of the Lord Chief Justice as to the great danger of relying entirely upon such admissions. In each case the question will be whether all reasonable ground for suspicion is removed. I think that all reasonable ground for suspicion is removed in this case. The mode in which the admission was first made to Mrs. Padfield who brought the charge against the respondent for a purpose of her own, the conduct of the respondent at the time and her subsequent conduct, followed up by the letters which she wrote from Southampton, take away all reasonable ground for suspecting that this is not a genuine case. I think therefore that there is sufficient proof of the adultery complained of, but before I make a decree I must examine the petitioner.

On the 28th of November, the petitioner was in attendance and was examined by the Court. He stated that as soon as he saw reason to suspect that there was an intimacy between his wife and Padfield, he remonstrated with them, and endeavoured to break it off, and that he was not aware that their intimacy was a criminal one until he returned home. He also proved that he had not condoned the offence.

The JUDGE ORDINARY granted a decree *nisi* with costs against the co-respondent.

T. *v.* M., FALSELY CALLED T.

Nov. 28.

Nullity—Malformation of Woman—Refusal of woman to submit to examination—Decree suspended.

The respondent in a suit for nullity by the man, on the ground of malformation, had not been personally served with the citation, and had never submitted to a medical examination, and could not be found, but was supposed to be out of the jurisdiction. No evidence could therefore be given that she was suffering from incurable malformation. The Court suspended its decree, in order to give the petitioner an opportunity of having her examined if she should hereafter be found within the jurisdiction.

THIS was a man's petition for a decree of nullity of marriage by reason of the incurable malformation of the woman. The respon-

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dent had not been personally served with the citation and petition, and substituted service had been made, by order of the Court, on her brother. No answer was filed. The petitioner had been examined by medical inspectors, who reported that there was no defect apparent in his person. The respondent had not been examined.

The petitioner's case was conducted by *O'Malley, Q.C.*, *Manisty, Q.C.*, and *M. Lloyd*, and was heard before the JUDGE ORDINARY sitting *in camerâ* on the 7th of July.

The petitioner stated in his evidence that he was married on the 11th August, 1864, he being then twenty-eight, and the respondent twenty-two or twenty-three years of age; that he made frequent attempts to consummate the marriage, but was unsuccessful, in consequence of the state of her person; that she and her mother remonstrated with him for these attempts; that she refused to be examined by a medical man; that on the 26th October, 1864, she left his house with her brother, and he understood she was to return at the end of a fortnight; and that he had never seen her since, or been able to discover where she was; that he had made frequent inquiries for her; that her younger brother had refused her address, and said she might be back in ten years, but he did not think she would; and her elder brother had said he would take care she should not come back; and that he had spoken to the medical men who had attended her, and they told him they had never examined her person.

The managing clerk to the petitioner's proctors proved that he had made fruitless inquiries after the respondent, and had subpœnaed her brother Henry, who was in attendance.

The respondent's brother Henry, in answer to questions put by the Court, said: "I did not know of the marriage taking place, but I heard of it soon after. My sister had been an invalid, and delicate, for many years. The marriage was approved of by my mother. I did not know the petitioner, and saw nothing of them after the marriage. I knew of her leaving her husband a day or two after she left. She came to me with my brother John. When we came to town, we met my mother at the Portland Hotel, and we stayed there about two hours." She did not say a word about having left her husband. She was very miserable. She did not

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mention her plans. She wanted to get away; fancied she should be claimed, and taken away by force. She had been to almost every doctor of eminence in London. I know of no specific complaint: there was weakness and pain in the back. I saw her again, a little before Christmas, in Brussels. That is the last time I saw her. I don't know where she is now. I last heard of her at Naples. She knows of this suit, and is unwilling to submit to examination. She knows what it is her husband charges."

The respondent's brother John was then examined, and said: "I lived near my sister and the petitioner, and for about a week I had meals in their house, and slept out. There was evidently a great difference between them; he was rather excitable. My sister had been an invalid for some time before marriage. My mother was in the house with them. There was no apparent sign of illness before marriage, except that she could not walk. I went with her from her husband's house. She gave as reason for going her husband's treatment. I could not get a distinct answer from her about it. She said it was something she could not mention to me—that it was too delicate. I last heard of my mother three or four weeks ago at Naples. I believe my sister knows of these proceedings."

THE JUDGE ORDINARY. I must see some one, at least, of the medical men who attended the respondent before marriage before I go further with this case.

On the 10th of November the following additional evidence was produced:—

A surgeon, who had attended the respondent in 1861 or 1862, said he had never examined her person, because she was particularly sensitive, and would not have allowed it. He was quite unable to say whether there was anything wrong with her sexual organs. His opinion was that the symptoms of which she complained did not arise from any organic disease, but from leucorrhœa.

Another surgeon proved that he had seen the respondent professionally several times before her marriage, and had sent prescriptions to her after her marriage. He had requested to be allowed to examine her, but her mother raised several objections, and no examination had taken place. After the marriage, her

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mother came to him, and he again suggested an examination, and she appeared to consent, but he had had no communication from them since. He had expressed a strong opinion, when he was consulted, judging from the symptoms described to him by the mother, that it was a case of imperforate hymen, and could easily be relieved. He had no doubt that imperforate hymen was the cause of the symptoms described by the mother. He saw no reason to believe from the description given him of the symptoms, that there was malformation. That could only be ascertained by a personal examination, if it existed.

The medical inspectors who had examined the petitioner proved the truth of their report that he was apt for coition, and that the respondent had not presented herself for examination.

Cur. adv. vult.

The Judge Ordinary. This petition was filed by a husband for the purpose of having his marriage with the respondent declared null and void on the ground of the incurable malformation of the wife, and the petitioner and some medical men were examined in support of the allegations in the petition. It appears that the marriage took place on the 11th August, 1864, that the parties lived together for about six weeks, and that at the end of that time the wife, under pretence of a temporary visit, left the husband's home in concert with her elder brother, and went with him to the continent in order to avoid the petitioner. The consequence was that the petitioner was unable to obtain what is invariably required in these cases, namely, a medical inspection of the respondent; and he has been placed in a difficulty as to proving his case, if it was capable of proof. But the Court must look at the evidence before it, and if that evidence is not sufficient to establish the proposition that the wife is the subject of incurable malformation, precluding consummation of the marriage, it cannot grant a decree. Now the evidence of the petitioner by no means satisfies the Court of that fact, and the evidence of the two medical men who attended the respondent, but neither of whom had examined her person, rather pointed to a complaint of a very different character, and in its nature curable. On that evidence the Court cannot grant a decree, but it will, as it

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has done in a former case, (1) suspend its decree if the petitioner desires it, with the view of having the respondent examined, if she should come to this country, as such an examination alone can satisfy the Court that a decree ought to be pronounced. If the petitioner is not satisfied with this judgment, but desires an opportunity of appealing from it, the Court will at once dismiss the petition.

Decree suspended.

JENNINGS *v.* JENNINGS.

Dec. 5.

Alimony—Practice—Rule 11*—Examination of Husband in support of Petition for Alimony—Subpœna—Attachment for non-attendance.*

A husband, who had filed no answer to his wife's petition for alimony, was subpœnaed by her to attend at the hearing, and to be examined in support of the petition. He did not answer to his subpœna, and on the service being proved, the Court made an order that he should attend on the next motion day, and that an attachment should issue in the event of his non-attendance.

THIS was a wife's petition. She had filed a petition for alimony, and no answer to it had been filed by the respondent. The petitioner had given notice, under the 11th Rule, of her intention to examine witnesses in support of the petition for alimony.

A witness was called, who proved that he had subpœnaed the respondent and a woman with whom he was alleged to be living to give evidence in support of the petition for alimony. The respondent did not answer to his subpœna.

F. H. Lewis, for the petitioner, moved for a rule *nisi* for an attachment against the respondent for non-attendance upon his subpœna.

THE JUDGE ORDINARY. I will make an order that the respon-

(1) M., falsely called H. *v.* H. (3 Sw. & Tr.) 517 & 592; 33 L. J. (P. M. & A.) 159 & 34 L. (P. M. & A. 12.) That was a suit by a woman, and the Court suspended its decree, and suggested that the petitioner should return to cohabitation in order to give the respondent another opportunity for consummating the marriage. The petitioner did return to cohabitation, and on evidence that the marriage remained unconsummated after the cohabitation had continued for about five weeks, and that the respondent had then left the country, the Court pronounced a decree of nullity.

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dent shall attend next Tuesday; and if he does not attend, I will issue an attachment.

On the following motion day (12th of December) the respondent attended in obedience to the subpœna and was examined on behalf of the petitioner in support of the petition for alimony.

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EVANS *v.* EVANS AND BIRD.

Order as to application of Damages—Practice.

Where it was proved, on the hearing of a petition, that there had been no issue of the marriage, and that at the time of the hearing the respondent was living with the co-respondent, the Court made the order for the payment to the petitioner of the damages assessed against the co-respondent part of the decree *nisi*, instead of postponing it until the decree absolute.

THIS was a petition by a husband for a dissolution of marriage, and claiming damages from the co-respondent.

The respondent and the co-respondent did not appear, and the case was tried by the Judge Ordinary and a common jury. The adultery charged was proved, and the damages were assessed at 150*l.*, and a decree *nisi* was pronounced with costs against the co-respondent. It was proved that there had been no issue of the marriage, and also that, ever since the petitioner separated from the respondent, she had lived with the co-respondent.

Dr. Spinks for the petitioner, moved that the co-respondent might be ordered to pay the damages to the petitioner. The respondent, under the circumstances, cannot ask that any part of the damages shall be applied for her benefit; and it is unnecessary postpone the order as to the application of damages until the decree absolute.

THE JUDGE ORDINARY. I order that the damages be paid to the petitioner, and the order will form part of the decree *nisi*.

GINGER *v.* GINGER. 1865 *Nov.* 15.

Judicial Separation—Adultery—Evidence.

A charge of adultery in a suit by a wife for judicial separation rested upon the evidence of one witness, who was a woman of loose character. The Court, without deciding affirmatively whether or not the adultery charged had been committed, declined to pronounce a decree upon her uncorroborated testimony, and dismissed the petition.

THIS was a petition by a wife for a judicial separation, on the ground of her husband's adultery. The respondent filed an answer denying the charge, and the case was tried by the Judge Ordinary without a jury.

Dr. Spinks and *Waddy* for the petitioner; *Dr. Deane, Q.C.*, and *Dr. Swabey* for the respondent.

The ~~petitioner~~ was a fishmonger in Bexley Heath, and he married the ~~respondent~~ in August, 1860. The only witness called to prove the charge of adultery was Emma Reeves, who deposed that she was twenty-one years of age; that the respondent had seduced her when she was twelve years of age; that he had frequently had connection with her before his marriage; and that since his marriage, in the year 1865, he had had connection with her on two occasions, and that she had been delivered of a child, of which he was the father, on the 7th October, 1865. In cross-examination she admitted that she had also had connection with two of the respondent's brothers, and with another man; and that when she found she was pregnant she had charged the respondent with being the father of her child, but had not prosecuted her claim against him for its maintenance.

A witness was produced on behalf of the respondent, who proved that on one of the occasions spoken to by Reeves, when an act of adultery was alleged to have been committed in the respondent's garden, she was in his kitchen which opened into the garden, and that she had seen Reeves pass through the kitchen and go into the garden; but that the respondent did not pass through the kitchen. She admitted that the respondent was in his parlour on the evening in question, and that he might have gone into the

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garden without passing through the kitchen; but she said she did not miss him from the parlour.

THE JUDGE ORDINARY. This case raises rather a serious question for the decision of the Court. The petitioner has been married for four or five years, and there are three or four children of the marriage, and to separate her from her husband is a very serious matter, not only to him but also to the children; but if she has established the adultery of which she complains, she is no doubt entitled to a decree. The question is, whether that charge is made out by evidence on which the Court ought to act; I should have preferred having the case tried by a jury, for the question is one of credibility, for which a jury is the fittest tribunal. If I were forced to decide whether the witness on whose evidence the charge rests was perjured or not I should hesitate to decide it in the affirmative, for there was no ground of suspicion in the way in which she gave her evidence; but it is a serious responsibility to undertake to separate man and wife on the unsupported testimony of one witness, and that a woman, by her own admission, of loose character. She had had connection with the respondent before his marriage, with his brothers, and with other men; and the fact that she charged the respondent with being the father of the child of which she was about to be delivered is one which cuts both ways. In one aspect it throws suspicion on her testimony; because a woman in that position, knowing that she was about to be delivered of a child, would be likely to lay it at the door of this or that person as her interest might point. Her testimony given under such circumstances ought to be closely searched, and the story which she tells is not a very probable one. The girl was living immediately opposite to Ginger, and it seems improbable that if their intimacy was renewed at all after his marriage, it should only have been on two occasions. Upon the whole, I think the charge is not established with sufficient certainty to enable me to pronounce a judicial separation. I therefore dismiss the petition.

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Nov. 28.

Custody and maintenance of Children after Dissolution of Marriage—Interveners —Settlements—22 & 23 Vict. c. 61, s. 5.

After a decree absolute had been pronounced for the dissolution of a marriage on the ground of the husband's adultery and cruelty, applications were made for the custody of the infant children of the marriage by their father and mother, and by third persons, who had been allowed to intervene for the benefit of the children. The Court being of opinion that neither the father nor the mother were, according to the evidence given at the hearing of the cause, fit to be entrusted with the care and custody of the children, gave the custody of them to the interveners, relatives of the husband, but directed that the parents should be allowed reasonable access.

In making an order as to settled property under the 22 & 23 Vict. c. 61, s. 5, the Court will take into consideration the conduct of the parties, as well as their pecuniary position. A marriage having been dissolved by reason of the husband's adultery and cruelty, an application was made for an order as to the settled property, under the 22 & 23 Vict. c. 61, s. 5. The Court estimated the total income of the husband at 1,159*l.*, part of it being derived from settled property, to which the wife had contributed 3,000*l.* It ordered that 200*l.* a year should be paid out of the settled property to the persons who were entrusted with the custody of the children of the marriage, for their maintenance and education; and taking into consideration that the wife was not free from blame, and that she had contracted debts to the amount of about 3,000*l.* previous to the separation, for which the husband was liable, and also the expense he had incurred by reason of the suit for dissolution, it ordered that 250*l.* a year out of the settled property should be paid, during the respondent's life, to the petitioner, *dum casta et sola vixerit.*

A DECREE absolute for the dissolution of the marriage in this case was pronounced on the 2nd of May, 1865, on the ground of the adultery and cruelty of the husband. There were two surviving children of the marriage, namely, Florence Chetwynd, born on the 29th of December, 1855, and Arthur Chetwynd, born on the 22nd of July, 1857. On the 24th of April, 1865, the petitioner, Mrs. Chetwynd, filed a petition for the custody of the children, who were then in the custody of their father. On the 22nd of May, 1865, the respondent filed an answer to this petition, praying that he might retain the custody of the children. On the 18th of July a motion was made on behalf of Sir George Chetwynd, the uncle, and Lady Hanmer, the aunt of the children, for leave to intervene and to propose a scheme for their maintenance and education.

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This motion was opposed on behalf of Mrs. Chetwynd. The Court held that it had power under the 20 & 21 Vict. c. 85, s. 35, and the 22 & 23 Vict. c. 61, s. 4, to allow a person who was not a party to the suit to intervene for the benefit of the children, if such person could shew that he had a right to intervene (1); and it gave leave to Sir George Chetwynd and Lady Hanmer to intervene as prayed. On the 28th of July, 1865, a petition was filed on behalf of the children by Sir George Chetwynd, as their next friend, alleging "that your petitioners are anxious that this honourable Court should authorize such a scheme for the custody, maintenance, and education of your petitioners, as is set forth in the order of the Court hereunder written:—That Sir George Chetwynd and Lady Hanmer are willing, on their parts, respectively, to undertake the duties and responsibilities cast upon them by the said order, provided that they are allowed to act free from any other control than that of this honourable Court, and independently of any other persons associated or interfering with them in carrying out the said scheme for the benefit of your petitioners under the authority of this honourable Court." The prayer of the petition was for an order that the custody of the petitioners should be confided, until further order, to Sir George Chetwynd and Lady Hanmer, and that an allowance of 200*l.* per annum should be made to Sir George Chetwynd and Lady Hanmer, by their father, Mr. Chetwynd, to be paid quarterly. Affidavits were filed by the petitioner and respondent, and by the interveners, in support of their respective applications. The case came on upon motion, and was heard by the Judge Ordinary, with the consent of all parties, sitting *in camerâ*, on the 9th of November.

A motion, on behalf of the petitioner, for an order under the 32nd section of 20 & 21 Vict. c. 85, for a permanent provision, and also for an order under the 5th section of the 22 & 23 Vict. c. 61, varying the marriage settlements, came on for hearing at the same time. The question was raised in argument whether the Court had power to make an order under the former section after decree absolute.

The Queen's Advocate and *Hannen* were for the petitioner, Mrs.

(1) 34 L. J. (P. M. & A.) 130.

Chetwynd; *Dr. Deane, Q.C., Hawkins, Q.C.*, and *Dr. Spinks*, for the respondent, Mr. Chetwynd; and *Stavely Hill* for the interveners. *Cur. adv. vult.*

Nov. 28.—THE JUDGE ORDINARY. The petitioner and respondent put forward rival claims to the custody, charge, and education of the two children of the marriage—a girl of nearly ten years old, and a boy of the age of eight. The professed anxiety of both parents is, so far as the facts elicited on the trial and the affidavits enable the Court to judge, perfectly sincere. The respondent was proved to be certainly very fond of his children, and though the testimony was by no means equally strong in regard to the care and affection of the petitioner, there is, I think, nothing in proof which impeaches her sincerity in now asking for their custody. When parents cease to live together the legal right to the custody of children of this age is with the father. But the Court has power to infringe upon this right, and, when the common home has been broken up by the conduct of the father, it frequently exercises its power in favour of the injured mother. Several cases to that effect were cited in argument.

It will be found, on reference to these cases, that it has been an invariable element in the decision that the wife herself has been free from blame. Thus, in *Marsh* v. *Marsh* (1), the wife is spoken of by the Judge as the "unoffending wife," and there was no evidence, however slight, of misconduct on her part. In *Boynton* v. *Boynton* (2), the full Court spoke of the marriage as "being dissolved by reason of the misconduct of the husband, the wife not having been to blame." And again, in *Suggate* v. *Suggate* (3), there was no imputation on the wife's conduct towards her husband during the cohabitation, though an attempt was made to prove her habits to be such as not to fit her for the education of the children; an attempt which the Court pronounced to have failed. These were all the authorities cited. It remains to apply them to the facts in the present case.

(1) 1 Sw. & Tr. 312.; 28 L. J. (P. M. & A.) 13; 5 Jur. N.S. 46.
(2) 2 Sw. & Tr. 276.; 30 L. J. (P. M. & A.) 156.
(3) 1 Sw. & Tr. 492; 29 L. J. (P. M. & A.) 167; 6 Jur. N.S. 127.

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Now, it can hardly be pretended that the petitioner, in the conduct of her married life, has been free from blame. I forbear to enlarge upon it, but it is necessary that some facts should be recalled in justification of the opinion I have formed. The singular life she led, the people with whom she was not ashamed to consort and of whom she was willing to borrow money, though commented upon in her disfavour at the trial, can hardly be accounted against her as failures in her duty towards her husband, for he permitted and encouraged her in this respect, if he was not to some extent the cause of it. But her indiscretion, to use no harsher term, in seeking the society of the two gentlemen with whom criminality was charged against her, and the latitude she allowed herself in her communications with them, form a more serious charge; while the undisputed fact revealed in her own journal—that she had for long surrendered her mind and affections to a guilty passion for one of them—is the gravest but one of connubial offences. The Court does not feel at liberty to abrogate, in favour of a wife thus acting, the legal right of her husband to the custody of the children.

But she may still be heard to argue that the respondent is not fit to have charge of them himself, and that for their sake, as well as hers, they should be placed in more proper hands. The gross vice and immorality of the respondent disclosed at the trial, coupled with the incredible obscenity of his letters addressed to Mrs. Knight, satisfy the Court that this is the case, and that some asylum other than the respondent's house should be sought for the nurture of this young lady and her brother.

In this state of things, Sir George Chetwynd and his sister have come forward to accept the charge. They pray that the children may be confided to them, and they give reason to believe that they will zealously superintend their education and culture. To their prayer the Court is prepared to accede, and the children will be committed to their care, giving both petitioner and respondent free access to them at proper times. A suggestion was made that the petitioner should be allowed to nominate some one to act with one of the respondent's family for this purpose. But the interveners both refuse to act under any such condition, and I do not think it desirable for the children that the rival spirit of the

petitioner and respondent should be infused into the minds of those who are to watch over the children's interests.

The petitioner further prays that the settlements made on her marriage may be altered in her favour under the powers of the 22 & 23 Vict. c. 61, s. 5, and that the Court should further secure her an allowance from the respondent under section 32 of the original Divorce Act. It is unnecessary to consider the questions raised under this latter section, as full justice can be done to the petitioner under the former. In entering upon this head of inquiry, the respondent complains much of the petitioner's extravagance in the past, and he appends to his affidavit a list of the debts still owing by her when she left him, and for which he expects to be made responsible. He swears the amount at 3,000*l.*, or more. The amount and character of these debts appear to exhibit an extravagance of which he might justly complain. Thus, there are no less than sixteen jewellers' bills, some for small sums, but one for 427*l.*, one for 96*l.*, one for 67*l.*, and others above 20*l.* In like manner there are seven bills for fancy goods and Berlin wool, the highest of which is 212*l.* Then there are five photographers and ten stationers, besides such bills for personal attire as might be expected. These bills, and the costs of the suit, are likely to make a considerable inroad upon the respondent's means. The next question will be—what is the probable amount of his available income when all is finally settled and paid? I estimate the respondent's income from the settled property, including that settled by the petitioner, at about 943*l.* But he has other sources of income; and in dealing with the settlements for this purpose, they ought not, I think, to be placed out of sight. He has a house called Longden Hall, the property of his family, and in which a life interest was devised to him by his mother, with the intention of his residing there. It is not easy to put a money value on this, nor is it necessary in the view which I take, and the purposes for which this estimate is made. He has land in his own occupation, and land which is rented by others. The income likely to be produced to him by these lands amounts, in my judgment, to 216*l.* He has also some share property, the value of which is very differently estimated by the petitioner and respondent. I do not propose to decide between them with any accuracy, for the debts, by

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way of costs, in these and other legal proceedings, coupled with the sums for which he is likely to be responsible in discharge of debts incurred by the petitioner will, in my opinion, leave little income from this source. Adding, then, the 216*l.* to the 943*l.*, his total means from all sources will amount to 1,159*l.* Out of the income of the settled moneys the Court is about to order 200*l.* to be paid annually to Sir George Chetwynd and Lady Hanmer for the maintenance and education of the children. This will reduce the respondent's income to 959*l.* The Court proposes that out of this sum the trustees shall be ordered to pay the petitioner annually the sum of 250*l.* during the respondent's life. This sum will be payable as usual, *dum casta et sola vixerit.* The petitioner will thus enjoy the whole income of the money which she brought into settlement, and 150*l.* a year in addition. The Court does not feel justified in releasing from the operation of the settlement the 3,000*l.* contributed by the petitioner, as the children have a contingent interest therein. And for the like reason no order can properly be made to extricate from the settlement the sum of money expected in reversion. But in respect to these sums, the Court may accede to the suggestion made on the argument, and will therefore order that so soon as any of the sums expectant in reversion, or any part thereof, shall be reduced into possession of the trustees, they shall pay the income thereof to the parties, petitioner or respondent, by whom, or on whose behalf, the same were respectively settled, this order to apply only to such part of the said reversions as may fall in during the joint lives of the parties, and the payments thereunder to be continued during such joint lives only.

In exercising the discretion accorded to the Court under the 22 & 23 Vict. c. 61, s. 5, I have felt bound to bear in mind the conduct of the two parties, as well as their pecuniary position. In section 32 of the original Divorce Act, by which power was given to make provision for the wife in case of divorce, the Court is expressly told to consider "the wife's fortune, the ability of the husband, and the conduct of the parties." And although these words are not repeated in the subsequent act, 22 & 23 Vict. c. 61, s. 5, they serve to exhibit the spirit of the legislature in these provisions, and form a fitting guide for the Court. In the endeavour to adjust the means to be accorded to the petitioner, and the burden to be borne by the

respondent, several considerations had to be borne in mind. It was well not to forget that, though the break-up of the married life was caused immediately by the misconduct of the respondent, its stability had been undermined by the withdrawal of the petitioner's affections. It was a subject of fair comment that, but for the extravagance of the petitioner, and the conduct which made her the object of her husband's not unreasonable suspicions, the common fund would have been more ample. Nor ought the fact to have been lost sight of, sworn to by the respondent, that the sum of 1,000*l.* had been received since the marriage by the petitioner, the benefit of which is now hers if she has not already spent it. The future of the respondent had also to be considered, and the available means which would be left him to sustain his position in his home. If the reasonable needs of the wife did not demand it, the Court could hardly feel justified in so reducing his income as to render his future residence on his property impossible. And lastly, the Court has drawn what assistance it could from the decided cases on permanent alimony. In Lord Pomfret's case, cited in *Otway* v. *Otway* (1), the income was 12,000*l.*, and the Court allowed the wife 4,000*l.*; but the larger part of the fortune had come from her. In *Durant* v. *Durant* (2) the income was 4,000*l.*, and the wife had 750*l.* In *Stoate* v. *Stoate* (3) the wife had one-fourth of the income. No positive rule can be extracted from these cases, nor does the subject admit of it; but they are not out of harmony with the decision at which I have thus arrived, not without much anxiety to do justice to both parties, but without much hope of giving entire satisfaction to either. The Registrar will draw up a formal order to embody these arrangements, and if either party is dissatisfied with the wording of it, they may attend me in chambers.

(1) 3 Phill. 110. (2) 1 Hagg. 530.
(3) 29 L. J. (P. M. & A.) 166 n.

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Dissolution of marriage—Cruelty—Drunkenness—Venereal disease—Wilful communication—Evidence—Presumption.

Habitual drukenness, and a series of annoyances, and extraordinary conduct on the part of the husband, do not constitute legal cruelty. The communication of a venereal disorder to the wife must have been wilful on the part of the husband to establish it as cruelty. But that wilfulness may be presumed from the surrounding circumstances, by the condition of the husband and by the probabilities of the case, after such explanations as he may offer. *Primâ facie*, the husband's state of health is to be presumed to be within his own knowledge; but he may rebut this by his own oath, when admissible as a witness, or by other proof.

THIS was a suit for dissolution of marriage brought by the wife on the ground of her husband's adultery and cruelty. The respondent appeared, and in his answer traversed the adultery and cruelty.

The adultery was clearly proved, and the only question raised was as to the sufficiency of the evidence to establish the charge of cruelty.

Dr. Deane, Q.C., and *Dr. Tristram* appeared for the petitioner.

Dr. Spinks, for the respondent.

The parties were married in 1854. The petitioner was the daughter of the manager of a bank at Norwich, and the respondent was a crape manufacturer. He recently retired from business, and is in comfortable circumstances. There was no issue of the marriage. The respondent was not charged with ever having done any act of violence to his wife, or with ever having threatened her with violence; cruelty was, however, charged on two grounds—viz. that he was a confirmed drunkard, and had made her life miserable for several years by his drunkenness, by a series of unendurable annoyances, and by his extraordinary conduct as detailed in the following particulars of cruelty, and of having twice, namely, in the month of January, 1859, and again in the month of February, 1863, knowingly communicated to the petitioner a venereal disorder.

The particulars of cruelty delivered, and relied upon, by the petitioner, were as follows :—

1. In the month of January, 1859, the respondent knowingly gave the petitioner the venereal disease.

2. In the month of January, 1863, at Surlingham, in Norfolk, the respondent violently abused the petitioner and her father in the presence of petitioner, and on the occasion of the petitioner's then leaving the respondent's house with her father, from fear of his violence, the respondent came to the carriage in which the petitioner and her father were, threw a pair of pistols into the carriage, called the petitioner's father a coward and a blackguard, and wished him to fight him.

3. In February, 1863, the respondent knowingly again gave the petitioner the venereal disease, and in that and the following month of March, he took the petitioner to Boulogne in France, to Brussels in Belgium, and back to Dover in Kent, then to Harley-street in London, and thence to Yarmouth in Norfolk, and where, in consequence of excitement caused by the petitioner's said illness the respondent's habits of intoxication, and his violent behaviour the petitioner was in April seized with an attack of paralysis.

4. In May and June, 1863, in various places in Switzerland, and particularly Weeson, the respondent's behaviour was violent and abusive in the presence of the petitioner, from whom he frequently remained absent for long and unreasonable times, leaving her without protection among strangers.

5. On the 9th of July, 1863, at Boulogne in France, the respondent abused the petitioner, became very violent in his behaviour, seized a chair, and with great force and violence, dashed it down upon the ground so that he broke it and forced the petitioner, from fear of him, to go for safety and remain for some time in the private room of the master of the hotel for protection.

6. In October, 1863, whilst returning from France to England, the respondent suddenly left the petitioner at Folkestone, refused to go any further with her or to say. where he was going, left the petitioner to go to London unprotected and without sufficient money for her necessary travelling expenses.

7. In April, 1864, the respondent, at a house on the Marine Parade, Yarmouth, abused and threatened the petitioner, and left

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her with the intention, as he told her, of going to a woman of ill-fame in Yarmouth.

8. In September, 1864, the respondent and petitioner being in London, the respondent put the petitioner into an omnibus in the city, bidding her return to their lodging in Pall-Mall, where he would find her. That the respondent never returned to the petitioner, but left petitioner unprotected in London four days, and wrote her a letter saying he was gone to the continent, and they might never meet again.

9. That on most occasions, hereinbefore referred to, the respondent was drunk, and that his violent behaviour in the presence of the petitioner was caused by her remonstrance with him on account of his habits of intoxication, which, in 1863, brought on delirium tremens.

The petitioner and other witnesses were examined in support of these charges, and established those contained under the first head.

On the charge of wilful communication to the petitioner of a venereal disorder, the following evidence was given:—

As to the charge in January, 1859, the petitioner deposed:—"At the beginning of 1859 I was very ill. Mr. Morgan (a medical gentleman) attended me during that illness. Dr. Rankin also attended me. I recovered at the end of four months. I did not know the nature of my complaint. My husband was with me during my illness."

Mr. Morgan, her uncle, stated he was a surgeon in practice at Norwich. He attended the petitioner professionally in January, 1859. She was then suffering from secondary syphilis. She had an eruption on the skin, and ulcerated sore throat, and skin disease peculiar to that complaint. It was the result of some impure connection, and must have been communicated within a few weeks before his attendence commenced. She was very seriously ill. Dr. Rankin was called in. He agreed with him as to the nature of her illness, and they treated her for that complaint. He did not communicate to her its nature.

As to charge of infecting the petitioner with a venereal disorder in February, 1863, the petitioner said she was then ill in London. The symptoms of her illness were skin eruption, great

pain internally, and a discharge. She had the same symptoms then as she had in the early part of 1859. She was attended during this illness by Dr. Merrit, who is now in New Zealand.

Mr. Morgan was recalled, and said he had heard the petitioner give her evidence of her illness in February, 1863, and, in his judgment, she was then suffering from syphilis. He had attended the respondent professionally. On one occasion the respondent asked him a question on the subject of venereal disease. Mr. Butler, who formerly practised as a surgeon at Yarmouth, stated that he attended the respondent professionally, in the autumn of 1862, for gonorrhœa. He recovered towards the end of the year.

No witnesses were called for the respondent.

Dr. Deane, Q.C., summed up the evidence for the petitioner, and submitted that the charge of cruelty was made out on both heads. The respondent might have been examined on his own behalf to contradict the charge of wilful communication of the venereal disease; and his non-examination supplied a strong presumption of his guilt.

Dr. Spinks, for the respondent, contended that it was against principle and precedent to treat the charges under the first head as cruelty; and that, to establish the charge of cruelty under the second head, the petitioner should have produced evidence to satisfy the Court that the communication of the venereal disease was wilful on the part of the respondent: *Jones* v. *Jones*. (1) It was for the petitioner to make out the charge by clear evidence; and, she not having done so, the Court ought not to supply her deficiency of proof from the inference suggested by the non-examination of the respondent.

Cur. adv. vult.

Dec. 5.—THE JUDGE ORDINARY. I reserved this case that I might consider the whole evidence. The adultery is clearly proved, and the only question is whether legal cruelty is established. The petitioner's life has been one long trial of patience and fruitless hope; for the vice of drunkenness in her husband shewed itself early, and maintained itself to the end. On the 15th of September, 1864, he finally left her. It is needless to recount the details

(1) Searle and Smith's Reports 133.

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of his conduct, for though very distressing to the petitioner, and probably the cause of an illness with which she was smitten in April, 1863, there were no traces of actual violence, and no threats of that character, such as to constitute legal cruelty; and the Court is not permitted to indulge its feelings, at the expense of unsettling the law, or break with the decided cases, to sympathize with the petitioner's misfortunes. A decree that should establish habitual drunkenness to be of itself ground for judicial separation, would be likely to have a wide application.

There was, however, another charge against the respondent of a character which falls within the legal definition of cruelty, and this, if established, would, I think, in conjunction with all the other features of this case, be sufficient to found a decree. Now, I quite concur in the argument that the communication of disease by the husband to the wife will only amount to an act of legal cruelty, if it be wilful. But the proof of this wilfulness may reasonably be sought in surrounding circumstances, in the condition of the husband, and in the probabilities of the case, after such explanations as the husband may offer. *Primâ facie*, it is fit to conclude that the husband's state of health would be within his own knowledge, though he may rebut this by his own oath (when admissible as a witness), or by such other proof as may be within his reach. In the present case the petitioner was proved to have been twice infected, at a considerable interval of time, during the cohabitation. The respondent, though a competent witness, did not present himself at the hearing to assert his ignorance, or establish his innocence of wilful wrong.

The only evidence in his favour is to be collected from the statement of a surgeon called by the petitioner, who attended him on one of the two occasions, and who stated that he had considered him convalescent a month before. This is hardly satisfactory as to the one occasion to which it relates, and leaves the other wholly unexplained. I hold, then, this charge to have been established, and decree a dissolution of the marriage, with costs.

Decree nisi, with costs.

IN THE GOODS OF AUGUSTA JANE HAY Deceased. 1865 Nov. 14.

Administration—Minor—Divorce—Grant to Guardian elected by Minor without citing her Next of Kin, her Father, who had been Divorced—Grounds for passing over Father—Grant directed to go in name by which Deceased passed—Practice.

Where the deceased had been divorced from her husband, and had died intestate, leaving an only child of the marriage, a minor, her sole next of kin, who had elected her maternal grandmother as her guardian for the purpose of taking out administration to the estate of the deceased, the court made the grant to the grandmother without requiring the minor's father (who was resident in New Zealand, and had, according to his own admission, as proved in the Divorce suit, been guilty of such recklessness and extravagance as to unfit him for an office of trust) to be cited, on filing in the Registry an office copy of the decree dissolving the marriage, and an affidavit annexing true copies of the letters referred to in 2 Sw. & Tr. 372. The grant was directed to go in the name by which the deceased passed at the time of her death.

The deceased in this case, formerly Miss Augusta Jane Hay, married, in 1852, Mr. Edward Daniel Lawrence. In January, 1862, the marriage was dissolved by a decree of the Divorce Court, on the ground of the husband's adultery and desertion. *Lawrence* v. *Lawrence.* (1) There was issue of the marriage an only child, Ada Mary Lawrence, now a minor of the age of twelve years. The Court had given the mother the custody of this child, and had directed that the trustees of an ante-nuptial settlement should hold the trust funds, which had been settled by the wife, upon such trusts as were therein declared, upon the death of the husband, as if he were then dead.

The deceased, who after the dissolution of the marriage, continued to pass as Mrs. Lawrence, died at Paris, on the 20th of September, 1865, a single woman, intestate, leaving personal property of the value of 9,000*l.*, and leaving her daughter her sole next of kin. Mr. Lawrence, the father of the minor, was, and had been for some time past, resident in New Zealand, and the minor had duly elected Mrs. Currie, her maternal grandmother, her guardian, to take out administration to the estate of the deceased, for her use and benefit.

Dr. Tristram moved "for administration of the estate of the

(1) 2 Sw. & Tr. 575; 30 L. J. P. & M. 97.

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deceased, to be granted to Mrs. Currie, as the duly elected guardian of the minor, for the use of the minor *durante minoritate*." The father, as sole next of kin of the minor, was, *primâ facie*, if willing, entitled to the grant, but a minor's next of kin might be passed over by the minor on just ground. In this case there were objections to his taking the grant, viz., his residence in a distant colony, the circumstance of his having been deprived, on the ground of his conduct, of the guardianship of his child, and of all interest under the post-nuptial settlement, and his own unfitness for business and for holding an office of trust, as described by himself in his letters to the deceased, which were given in evidence on the hearing of the petition in the Divorce Court. He thus writes of himself:—"I have been ashamed to write to you to tell you of my fearful extravagance. I have never been free from debt since I have been here. I lost over 300*l.* out of the chest in bank notes through carelessness. I have drawn bills upon home to the amount of 593*l.* Three bills have already been sent back dishonoured, and I owe 800*l.* more here, making a total of 1,400*l.*" (1) Again, "I went to Paris; lost a large sum of money at cards. I have behaved shamefully. I made use of your name in one instance, and in one your mother's, to obtain articles which I sold for a mere trifle." (2) Upon these grounds he submitted the father might be passed over without being cited. There was also a point of practice raised in this case. The rule in the Registry had heretofore been, that when a divorced woman had made a will, probate should go in the name by which she described herself in the will, but that when administration of the effects of a divorced woman was granted, it should go in the name by which she passed previous to her marriage. The deceased after the divorce had always passed by her married name, and a leasehold house of considerable value had been since assigned to her in that name. If the grant were to go in her maiden name, some inconvenience might be experienced in making out a title to this property; and he, therefore, asked the Court to direct the grant to go in the name of Mrs. Lawrence.

SIR J. P. WILDE. I think the grounds are sufficient to justify me in making the grant to Mrs. Currie without citing the minor's

(1) 2 Sw. & Tr. 378-9. (2) *Ibid.* 381.

father. But, before the grant passes, there must be filed in the Registry an office copy of the decree dissolving the marriage, as also copies of the letters you have referred to, as having been put in evidence in the divorce suit, annexed to an affidavit, verifying them as true copies The name by which the deceased passed, and was known at the time of her death, is the name by which she should be described in the grant.

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IN THE GOODS OF AUGUSTA JANE HAY.

IN THE GOODS OF HUBBARD, DECEASED.

Dec. 5.

Will—Incorporation—Deed falsely described as Will—Revoking Clause in Testamentary Paper disposing of no Property—Practice.

A reference in a duly executed testamentary paper to a document as a will, which is not of a testamentary character, is not alone sufficient to entitle such document to probate as a will. A testamentary paper containing a clause of revocation of any testamentary papers is entitled to probate, although it does not purport to dispose of any property, and there is no evidence of the existence of any previous testamentary papers.

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CHARLOTTE HUBBARD, widow, died on the 13th October, 1865. By an indenture of settlement executed on the 10th November, 1851, and made between George Hubbard, the husband of the deceased of the first part, the deceased of the second part, and E. Bovey and A. Gow of the third part, a freehold estate was settled upon such trusts as the deceased should by deed or will, or codicil, appoint, and in default of appointment, upon the deceased for life, and then upon her husband for life, and then upon trust, to sell and divide the proceeds between such of her three children as should be living at the time of her decease. The deed also gave to deceased power to appoint new trustees. The surviving trustee at the time of her decease was her son, A. Gow. She did not exercise the power of appointment as to the freehold estate under this deed. At the foot of the deed was written the following codicil:—

"I, Charlotte Hubbard, being of sound mind, do add unto my will this codicil, hereby revoking any other codicil or codicils at any time heretofore made by me. I constitute and appoint my

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IN THE GOODS OF HUBBARD.

said son, Alexander Gow, my sole and onl, trustee and administrator under my said will.

"Signed by me this day, 9th of May, 1861.

"CHARLOTTE HUBBARD.

"CHARLES PLUMBRIDGE.

"ANN PLUMBRIDGE."

The deceased left no other testamentary paper. The attesting witnesses swore that the deceased, when she executed the codicil, pointed to the deed, and said, "This is my will."

Dr. Deane, Q.C., moved for a grant of probate of the deed and the codicil, as together constituting the will of the deceased to Alexander Gow, as executor according to the tenor.

SIR J. P. WILDE. The Court cannot grant probate of a testamentary paper, unless it sees that it takes effect on something. But the deed disposes of no property after death, nor does the codicil. The only testamentary part of the codicil is the revocation of other testamentary papers. Gow is appointed an executor, not of the codicil, but of the so-called will, but as there is no ground for saying that it is a will, he cannot be the executor of it. All I can do is to grant administration to the next of kin with the codicil annexed, as that is a testamentary paper containing a distinct revocation of any previous testamentary papers.

Dec. 12.

TIPPETT *v.* TIPPETT.

Costs—Unsuccessful Opposition to Will.

The Court refused to condemn in costs a next of kin who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, the testator's medical attendant, to the effect that when the will was read over the testator signified his approval of it by gesture only, and that he could not swear that the testator was of sound mind.

THE plaintiff was the widow of Charles Tippett, deceased, and she propounded his will dated the 6th of February, 1865, whereby she was appointed universal legatee and sole executrix. The defendant, who was one of the next of kin, pleaded undue execu-

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tion and incapacity. These issues were tried before Keating, J., and a common jury at the Cornwall Summer Assizes. The execution of the will was attested by three witnesses, one of whom was Mr. Hillier, the medical attendant of the deceased. Two of the witnesses were called by the plaintiff to prove the due execution of the will and the capacity of the testator. Mr. Hillier was called by the defendant to prove incapacity. The jury found a verdict for the plaintiff on both the issues. The case now came before the court upon the question of costs. An affidavit made by Mr. Marrack, the defendant's attorney, was filed, wherein he deposed that after the death of the deceased, his firm, acting on behalf of the defendant, wrote to Mr. Hillier for information respecting its making and execution, and the state of mind of the testator; that Mr. Hillier wrote to his firm as follows:—

"St. Austell, March 8, 1865.

"GENTLEMEN,—I am in receipt of your favour of March 6th. I beg to say in reply to it that I was the medical attendant upon the late Mr. Charles Tippett, of Gurtha, in the parish of Luxilian; At the request of his wife I drew up the will in question, and having read it over to him three times, he answered by gesture only that the document was what he desired. I cannot swear that he was in full possession of his mental faculties when the will affecting the disposition of his property was signed. I am, &c.;" that in consequence of the information contained in this letter, and other information, the suit was instituted to ascertain the validity of the will; that at the trial Mr. Hillier was called as a witness on the part of the defendant, and gave evidence that at his last visit to the deceased, on the day of the date of the will, he found him in a low muttering delirium; and that when the will was executed he held the hand of the deceased, and assisted him to sign his name, and that the deceased was almost in a dying state at the time, and died within an hour and a half after the execution.

H. Bullar, for the plaintiff, moved the court to pronounce for the will, and to condemn the defendant in costs.

Dr. Spinks, for the defendant, moved that the defendant's costs might be allowed out of the estate. The letter of Mr. Hillier

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fully justified him in insisting on an inquiry into the deceased's state of mind.

Bullar, in reply. No inquiry was made of the other attesting witnesses, and Mr. Hillier was not even examined before the trial. If proper inquiry had been made on behalf of the defendant, the suit would never have been instituted.

SIR J. P. WILDE. I think I can dispose of this question without consulting the learned judge who tried the cause. One of the attesting witnesses, a medical man, gave information to those opposing the will, to this effect: "I drew up the will, and having read it over to the testator three times, he answered by gesture only. I cannot swear that he was in full possession of his mental faculties at the time." One can well understand that he might not be able so to swear, because the testator died within an hour and a half after the execution of the will. Having given this information, Mr. Hillier was called as a witness, and gave evidence that on his last visit he found the testator in a low muttering delirium, and on the occasion of the execution of the will he held his hand, and assisted him to sign, and he was almost in a dying state, and he died in an hour and a half afterwards. Now, there is no ground for believing that the witness was perjuring himself, or was in any way interested in the will. On the other hand, witnesses were called who had also attested the will, and who said the testator was in his right senses. No doubt the fact that the medical man was willing to become a witness to the will, although he afterwards denied the full competency of the testator, is to some extent to his discredit. But the question is not whether the verdict is right, for no application is made to disturb it, but whether under these circumstances those who relied on the testimony of one of the attesting witnesses, who was a medical man, ought to be condemned in costs. I think they ought not. Although they will not be condemned in costs, they do not come within the rule by which the court allows costs out of the estate, and I therefore pronounce for the will, and make no order as to costs.

LEMAGE *v.* GOODBAN AND OTHERS.

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Will—Revocation—Two partly inconsistent Wills admitted to Probate.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate.

Where there are two testamentary papers, each professing in form to be the last will of the deceased, the Court in determining whether one or both are entitled to probate must be guided by the consideration, not whether the testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain.

THIS was a cause of revoking a probate, which had been granted on motion, of the will of the testator, John Lemage, who died on the 25th of January, 1864, at an advanced age, a bachelor, without parent, leaving Rachael Lemage, his sister by the whole blood, and Marmaduke Lemage, the plaintiff, his brother by the half blood, his sole next of kin, and the only persons entitled in distribution to his personal estate, him surviving. He left freehold and leasehold property and personal effects of considerable value. There were discovered after his death only two finished testamentary papers, both in holograph, the earliest unattested, and dated the 24th of December, 1823, and the later one purporting to have been attested by three witnesses, and which, from the watermark and from internal evidence, as well as that of one of the attesting witnesses, must have been executed between the years 1827 and 1829.

The earliest will described in the proceedings as paper A was in the following terms: "In the name of God, Amen. I, John Lemage, of No. 31, Gloucester Street, in the parish of St. George's, &c., do make this my last will and testament in manner following: First, and principally, I commend my soul to God, &c., and as to such worldly estate as God of His goodness hath bestowed on me, I give and dispose thereof as follows—that is to say, I give and devise unto and to the sole use of my dear sister, Rachael Lemage, spinster, at present residing at, &c., to her, her heirs and assigns, all and everything which I may possess in the world at the time of my decease, namely, my freehold house, situated and being No. 10, Great Earl Street, Seven Dials; also my

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leasehold estate, situate and being No. 54, St. John Street Road, &c.; likewise all the money that I may possess, whether in cash or bonds as security for money, such as India Bonds, Danish Bonds, Spanish Bonds, together with seven hundred and fifty-one rentes in the French Funds, and being inscribed in the great book as above, with all interests on rentes which may be due on the aforesaid. I likewise bequeath to dear sister before-named all my household furniture, plate, linen, china, watch, chain, seals, or trinkets of any kind belonging to me, also all my books, prints, paintings, mathematical and philosophical instruments, wearing apparel, &c., &c., &c.; and do hereby appoint and make my dear sister, the aforesaid Rachael Lemage, my whole and sole executrix, requesting her to pay the expense of my funeral out of the effects, together with a bond held by my father from me for 400*l.* sterling, should he demand the same, the said bond being the only one which I owe, nor any debts, except for rent, which will only be from the preceding quarter day. If from my ignorance of the law I should have omitted anything, I here repeat that it is my wish and most solemn will that my dear sister, Rachael Lemage, shall come into possession of everything which I may possess at my decease. This 24th day of December, 1823—John Lemage."

The later will, described as paper B., was as follows:—"In the name of God, Amen. I, John Lemage, of No. 31, Gloucester Street, Queen's Square, &c., *do make this my last will and testament in manner and form following*:—I give, devise, and bequeath unto my dear sister, Rachael Lemage, spinster, the whole of my moneys and securities for moneys whatsoever and wheresoever, as the whole of money inscribed in my name in the great book in the Bank of France, about seven hundred and fifty-one rentes, or whatever it may be; also all bonds of whatever description. I further give unto my sister aforesaid my leasehold house in St. John Street Road. I also give and devise and bequeath unto my sister my half-share of the freehold house left me by my father in Earl Street, Seven Dials. I also give unto my sister aforesaid the annuity or rent-charge secured to me by Maria Lemage, widow of my father, on my said father's estate. I likewise give unto my sister aforesaid all my plate, linen, and china, philosophical instruments, *and effects of every kind and description, together*

with the whole of the above specified for her use, or her heirs, executors, administrators, or assigns for ever, according to the description thereof, that is, the said property. I do further devise and bequeath unto my sister aforesaid, or to her heirs, executors, administrators, or assigns, my share or portion of the money that shall be produced from the sale of the estate of my father, which he directed by his will to be divided among his six children, as described, or to their heirs, executors, administrators, and assigns. I *further distinctly state that if I have omitted any legal point or form, that is my intention that my sister Rachael Lemage shall die possessed of, for her own use and disposal, how to whom she pleases.* And I do hereby nominate and appoint my sister whole and sole executrix to this my last will and testament. (S.D.) J. Lemage. Signed, sealed, declared, and published by the abovenamed John Lemage, as and for his last will and testament, in the presence of us, who at his request and in his presence have subscribed our names as witnesses. (S.D.) George Charlton; (S.D.) Joseph Wellsher; (S.D.) Henry Easton."

On the 26th day of April, 1864, Rachael Lemage, without notice to the plaintiff, who was then unaware of his half-brother's death, obtained a decree on motion, for probate of the two papers A. and B., as together containing the last will of the testator, to be granted to her, and afterwards took probate thereof as sole executrix. Rachael Lemage shortly afterwards died. The plaintiff subsequently, upon ascertaining what had been done, extracted a citation from the registry calling upon the executors of Rachael Lemage to bring in the probate and shew cause why it should not be revoked, and probate granted of the last will only.

The defendants, the executors of Rachael Lemage, appeared to the citation, and delivered a declaration wherein they alleged, "that the testator wrote and signed the paper writing bearing date the 23rd day of December, 1823, and now in the registry of the court, and marked A., beginning thus, &c., and ending thus, &c., that at some time subsequent thereto, and prior to the year 1830, he duly signed the paper writing marked B. now remaining in the registry of this court, beginning thus, &c., and ending thus, &c., and subscribed the same in the presence of three witnesses, and alleged his capacity at the time of the execution of

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the two paper writings, and that the said paper writings A. and B. together contain the last will and testament of the said testator; and that on the 7th day of January, 1864, probate of the last will and testament, as contained in the said paper writings A. and B., was granted to the said Rachael Lemage by the principal registry after the Court had been moved to make the said grant. That the said Rachael Lemage died on, &c., leaving a will, whereby she appointed the defendants executors, who had duly proved the same. The plaintiff by his pleas,

1. Denied that the said paper writings marked A. and B. together contained the last will and testament of the testator, as in the declaration alleged.

2. That the said paper writing marked A. was revoked by the said paper writing marked B.; upon which pleas issue was joined.

Nov. 8. *The Queen's Advocate* (*Sir R. J. Phillimore*), and *Dr. Spinks*, for the defendants. Both papers are entitled to probate, unless B. expressly, or by necessary implication, revokes A. There is no express clause of revocation in B. The use of the words "last will and testament" does not work a revocation, see *Cutto* v. *Gilbert* (1), and *Stoddart* v. *Grant*. (2) Nor are the dispositions of the testator's property contained in B. inconsistent with those in A. If probate of A. is refused, there will be an intestacy as to the residue, which it is clear the testator never intended. The last clause in B., which the testator clearly intended to be a residuary clause, as it stands, is insensible, and there can be no doubt that the testator, by mistake, left out after the words "Rachael Lemage" the words "shall come into possession of everything I," or words to that effect, so as to give his sister the residue. The only way in which effect can be given to his intention is, to grant probate of both papers. *Geaves* v. *Price* (3); *Birks* v. *Birks* (4); Jarmin on Wills, edit. 1861, p. 168.

Dr. Tristram, and *W. Forster*, for the plaintiff. The function of the Court of Probate is not to determine how the testator intended to dispose of his property, but what paper or papers he intended to constitute his will when he executed the paper B.

(1) 9 Moo. P. C. 131.
(2) 1 Macq. Scoth App. C. 171.
(3) 2 Sw. & Tr. 71; 32 L. J. (P. M. & A.) 113.
(4) 34 L. J. (P. M. & A.) 90.

The real question, therefore, here is, did he at that time intend the two papers, or paper B. only, to constitute his will. It is a question of intention, and intention only, and the inquiry should be limited to the date of the execution of paper B. To determine what his intention was at that time, recourse must be had to what took place at the time of the execution of paper B., or to the terms of the paper itself. The memory of the only attesting witness to paper B. examined is a blank as to what occurred at the time of its execution, and there is, therefore, nothing to shew that paper A. was before the testator at that time, so as to give colour to the suggestion that he intended its incorporation. Then, on looking at the contents of paper B., it seems to have been intended to be the sole and independent will of the testator's 1. For it contains no reference to paper A. 2. Both at the beginning and at the end it is designated his last will and testament. 3. It appoints Rachael Lemage his sole executrix, which she was appointed by the will of 1823. 4. It gives to the sister almost all the identical properties by name which were given to her also by name by paper A. The authorities are in favour of the plaintiff. 1 Williams on Executors (5th ed.) 138. *Sandford* v. *Vaughan and Others* (1); *Plenty* v. *West* (2); *Henfrey* v. *Henfrey* (3); *Cutto* v. *Gilbert* (4); in which case the Judicial Committee merely decided that as there was no evidence as to the contents of the will, which was alleged to have revoked a former will, except that it commenced "This is the last will and testament of me, &c.," these words alone were not sufficient to work a revocation. See also *Harwood* v. *Goodwright.* (5)

Cur. adv. vult.

Dec. 12. SIR J. P. WILDE. After carefully considering the authorities cited in argument, I retain the opinion expressed on the exparte application for probate. The case of *Plenty* v. *West* (2), so far as it supports the doctrine, that the use of the words "last will' in a testamentary paper, necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert* (6), and

(1) 1 Phill. 47.
(2) 1 Rob. Ecc. 204.
(3) 2 Curt. 468; 4 Moo. P. C. 29.
(4) 1 Spinks, 417.
(5) Cowp. 90.
(6) 9 Moo. P. C.

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Stoddart v. *Grant* (1), and the case of *Henfrey* v. *Henfrey* (2), only decides that, a second will disposing of the whole estate, revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says, "The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers, will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the "intention" to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate,—is the true question.

(1) 1 Macq. (2) 4 Moo. P. C.

And so this court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain. In this case such a task is not difficult. The first paper makes the testator's sister the sole object of bounty and residuary legatee. The second is to the like general effect; no new object of bounty is introduced, and the sole reason for its execution seems to have been, that the testator's father had died in the interval, and that half a freehold house, and a share of personalty, had devolved on him by that event. These new acquisitions he devises and bequeaths in the same direction. But the residue is not disposed of, the clause apparently intended for that purpose being defective in its language, and not reading sensibly. The Court, can, however, see thus far into the intent of that clause—that the object of it was the same sister whose name alone appears in both papers. It would not be reasonable, under such circumstances, to conclude that the testator intended to revoke the residuary bequest in the first paper, and as effect can only be given to that disposition by granting probate of the first and second papers as together constituting the will—The Court so decides. I pronounce for the two papers.

Dr. Tristam asked for the plaintiff's costs to be paid out of the estate.

Dr. Spinks contrà.

SIR J. P. WILDE. Acting upon the rule I have laid down for my own guidance, I think that the plaintiff's costs should be paid out of the estate. The litigation was justified by the state in which the testator left his testamentary papers.

Attorney for plaintiff: *H. H. Beckett.*

Attorney for defendants: *W. Carpenter.*

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HASTILOW *v.* STOBIE.

Will—Knowledge and Approval of its Contents—Plea.

It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents.

THE plaintiff, in this case, propounded in a declaration the will of Vincent Phillips, deceased, dated the 10th of February, 1863, as the sole executor thereof.

The defendant, as the sole executor of a prior will, in answer to the declaration pleaded—1. Undue execution; 2. Incapacity of the deceased at the time of execution; 3. That the deceased, at the time he signed the said pretended will, did not know and approve of the contents thereof; 4. That the execution of the said will was procured by the undue influence of the plaintiff and two other persons named.

Demurrer to the third plea—That it was bad in substance, on the ground that a will may be valid, although the testator did not know and approve the contents thereof—Joinder in demurrer.

Nov. 28. *Dr. Spinks* in support of the demurrer.

It is impossible to attach to this plea any definite meaning. The facts stated in it, if proved, might be given in evidence under the 2nd plea, charging incapacity, or under the 4th plea, charging undue influence, or under a plea of fraud; but it is not a good plea to the declaration, for it is not a distinct answer to it. There are only three grounds on which a will may be invalidated, given in Williams on Executors (1), namely, 1st. The want of sufficient legal discretion; 2ndly. The want of liberty or free will; 3rdly, The criminal conduct of a party concerned in the making of a will. These do not include the ground alleged in this plea. Moreover, in *Middlehurst* v. *Johnson* (2), Sir Cresswell Cresswell held that a plea "that the will was prepared and made by an attorney, and that the deceased did not give instructions to the

(1) Lib. 2, c. 21. (2) 30 L. J. (P. M. & A.) 14.

said attorney to prepare and make the will as propounded" was bad, for he said, "that, if the attorney had made the will himself without instructions, and brought it to the deceased, and asked him to execute it, and he, after making himself acquainted with the contents, had executed it, it would have been a valid will. Indeed, it is not necessary that a testator should be acquainted with the contents. If he had said, 'I will execute any will you draw up,' and a will had been drawn up, and he had executed it without more, it would have been a good will. I object to the introduction of these novelties in pleading. The defendant might have pleaded that the alleged will was not the will of the deceased."

[SIR J. P. WILDE. That observation, and a similar dictum laid down by Sir C. Cresswell in *Cunliffe* v. *Cross* (1), have always struck me as deserving of reconsideration. There is no case in which it has been decided that a will, the contents of which were proved to have been unknown to the testator, was a good will.]

Dr. Spinks. My objection is twofold—1st. That it is not necessary to show a knowledge and approval of the contents of a will at the time the testator executes it. He may adopt and execute a will made by another person, without knowing its contents, or, knowing them, without entirely approving them. In either case the will would be valid. 2ndly. The plea is, from its vagueness, embarassing.

[SIR J. P. WILDE. If the plea is not sufficiently explicit you should apply to have it amended as embarrassing.]

Dr. Wambey for the defendant. The opinion or dictum expressed by Sir C. Cresswell in *Middlehurst* v. *Johnson* (2), and reiterated by him in *Cunliffe* v. *Cross* (1), is at variance with one of the first principles of the testamentary law of this country. The power of making a will is an important privilege, reposed by law in persons of sound mind and of full age, for the due exercise of which they are personally responsible. A testator is not at liberty to delegate this power to another. If he exercises it at all, he must do so himself. A vicarious will has never been recognised by the

(1) 3 Sw. & Tr. 37; 32 L.J. (P.M. & A.) 68;

(2) 30 L. J. (P. M. & A.) 14.

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law of England: thus, Swinburne, in commenting on the words "our will," says, "They exclude those wills which depend on another man's will; wherefore, if the testator should refer his will unto the will of another, as if he should say, 'I give thee leave and authority to make my will, and to make executor for me who thou wilt,' and he were to make a will in his name, yet this will is void in law; for, as thy soul is not my soul, so thy will is not my will, nor thy testament my testament." See also Hopp, Commen. Inst. Just. Lib. ii. Tit. 10: *Longchamp* v. *Goodfellow and Fish.* (1) Again, he submitted, that in order for a will to be valid the testator must both know and approve of its contents, for without a knowledge he could not approve of them. See *Billinghurst* v. *Vicars* (2), *Mitchell* v. *Thomas* (3), *Butlin* v. *Barry* (4); 1 Williams on Executors, 312; *Ingram* v. *Wyatt* (5), *Greville* v. *Tyler.* (6) The principle laid down in these cases is adopted in the practice, for by the 71st rule (1862) the registrars are forbidden to grant probate of the will of a blind or illiterate person. unless satisfied that it was read over to him before execution, or that he had at such time knowledge of its contents.

[SIR J. P. WILDE. What would have been the proper plea to raise the defence, in the case of *Ingram* v. *Wyatt,* (5) decided in the Prerogative Court? It was not shewn that the testator, in that case, was of unsound mind, or that the will was obtained by undue influence, or by fraud, yet the will was upset. The fact is this question of pleading is new ground. In the Ecclesiastical Court it was not requisite to specify by plea the precise ground of every objection that might be taken to a will, because all the evidence was set out in an allegation. In the courts of common law, where the validity of wills relating to real property is tried, the questions arising are tried either in an action of ejectment, where the most general and formal plea only is required, or by issue of *devisavit vel non;* but in this court the various defences form the subject of separate pleas, and it may be a great saving of

(1) 2 Bos. & P. N. I. 415.
(2) 1 Phill. 195.
(3) 5 N. of Cas. 612.
(4) 1 Curt. 614; 6 Moore P. C. 480.
(5) 1 Hagg. Eccl. 384. On appeal, 3 Hagg. Eccl. 466.
(6) 7 Moore P. C. 320.

expense to divide the defence into separate pleas. I will consider the matter.]

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Cur. adv. vult.

Dec. 12. SIR J. P. WILDE. The defendant has pleaded to a declaration on a will that the deceased did not "know and approve of the contents thereof;" and the question is, whether this plea is bad, not in form, but in substance. The main ground taken against it was indicated by Sir Cresswell Cresswell in the two cases which have been cited, where he is reported to have said, as an abstract proposition, that a man might make a good will without knowing anything of its contents. But he never had occasion to expressly decide this point. This proposition is certainly rather a startling one, because it conflicts with the natural and popular idea of the nature of a will; and it is at variance, besides, with the universal practice of mankind in such matters. For, however much men have been in the habit of yielding to the pressure and opinions of others in disposing of their property, I suppose no case ever yet to have occurred in which a man in possession of his full faculties handed over the making of his will to another, and was content to execute it without so much as the curiosity even to know what it contained. But still the question remains whether a will so made, if duly executed, would be good in law; and I am constrained to come to the conclusion that it would not. It might be enough to say that, as the books abound with discussions as to the testator's intentions and state of knowledge, all based upon the foundation that a will is the act of a man's own intelligence and volition, the burthen of shewing by authority that such a will as is now in question would be valid lies upon those who assert it, and that no text writer, modern or ancient—no judgment of any tribunal, here or elsewhere—and no dictum even, save the two to which I have referred, has been adduced in its support. It is extremely difficult in such a case to prove the negative; and the more completely such a notion is novel and out of question in our law, the less likelihood there is of meeting with a case against it. But there are considerations drawn from the undoubted law which go a long way to refute it. First, there is the practice of this court. Rule 71, which provides that in the case of blind and illiterate persons the

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registrar must be satisfied that the testator "had knowledge of its contents." Then there is the definition of a will, to be found in Swinburne, and adopted by Mr. Justice Williams in his book on Executors: "Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit." Also the etymology of the word testament, to be found in the second book of Just. Institutes, chap. x: "Testamentum ex eo appellatur quod testatio mentis sit." There is also the passage cited in argument from Swinburne, part 1, sec. 3: "Wherefore if the testator should refer his will to the will of another, as if he should say, 'I give thee leave and authority to make my will, and to make executor for me who thou wilt, &c.' If hereupon thou didst make a will in his name, and didst name an executor for him, yet this will would be void in law. For as thy soul is not my soul, so thy will is not my will, nor thy testament my testament." There are also certain consequences which must follow from holding such a will good; and the most important of these is, that it would no longer be necessary to shew that a testator was, in the old language of the law, of "sound mind, memory, and understanding." These words have been time out of mind held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator was about to affix his signature. But if the mental act of disposing can be delegated to another, and a blind confidence in his dispositions all that is required in a testator, the "sound disposing mind" is a needless requisition. Nor would it be easy to acquit the law of an absurdity, in requiring of a testator a capacity to understand an instrument, the contents of which it did not require him to know. Considerations of a similar character will be found to arise in applying the functions of a court of construction to such a will as that in question, but it is needless to pursue them. Assuming, then, that it is necessary that a testator should know the contents of his will, it cannot be doubted that he must also approve them. It was suggested that the word "assent" would be more proper. But the word "approve" will be found, *passim*, in the judgments of the Prerogative Court and the Privy Council, and it is best to adhere to known terms. No doubt the testator's approval is, but for some special circumstances attending the execution of

the will, to be conclusively drawn from the fact of his signature, if duly attested according to law. I say "attending the execution" advisedly; for if the execution, with full testamentary intention and knowledge, is unimpeached, no inquiry into his approval from the other sources is permissible. But such circumstances may, and do arise; and there is a whole class of cases, of which *Butlin* v. *Barry* (1) is the chief, in which wills have been set aside on the express ground that the testator did not know and approve of the contents of the instrument at the time when he executed it. I hold, therefore, this plea to be good in law.

The other matters urged in argument are proper for discussion only on an application to the Court to disallow the plea, on account of its generality and tendency to embarrass the plaintiff. And I hope shortly to devise some general rules which will make any such applications in each particular case unnecessary. (2)

Costs to be costs in the cause.

Attorney for plaintiff: *J. S. Hincks.*
Attorneys for defendant: *Brown & Godwin.*

(1) 1 Curt. 614; 6 Moo. P.C. 480.

(2) 11 Rule.

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Jan. 11.

COLES *v.* COLES AND BROWN.

Attesting Witness—Evidence—Discrediting adverse Witness.

A party propounding a will is bound to call one at least of the attesting witnesses, if he can be produced, to prove the due execution, and if such witness fails to prove the due execution he is bound to call the other, although he may know him to be an adverse witness.

If an attesting witness called by a party propounding a will gives evidence against the will, the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he has denied having made such statements and he is not a hostile witness.

THE issue in this case was, whether the will of William Coles, propounded by the plaintiff as executrix, was duly executed. The cause was tried by the Court without a jury. The attesting witnesses to the will were Joseph Smith and William Brown. Joseph Smith was examined on behalf of the executrix, to prove the due execution. He was eighty years of age, and his evidence was so full of contradictions and so unintelligible that the Court could draw no conclusion from it. The other witness, William Brown, was then called on behalf of the executrix, and his evidence was that the will had not been duly executed, inasmuch as the testator had neither signed it nor acknowledged his signature in the presence of the two witnesses. In answer to questions put to him in his examination in chief, he gave an account of a conversation with James Coles, a younger son of the deceased, respecting the execution of the will, and tending to show his *animus* in the matter. James Coles was afterwards called on behalf of the executrix, and gave evidence, contradicting the evidence of Brown, that the will was not duly executed. He was then asked a question as to the conversation with Brown, of which Brown had given evidence.

Dr. Spinks, for the defendant, objected.

Dr. Deane, Q.C. (*Abbott* with him), for the plaintiff. We were obliged to call Brown, because the other attesting witness did not prove the due execution. (1) He is not our witness, but the witness of the Court. We are thus entitled to treat him as a hostile

(1) *Owen* v. *Williams*, 32 L. J. (P. M. & A.) 159. See also *Belbin* v. *Skeats*, 1 Sw. & Tr. 148; 27 L. J. (P. M. & A.) 56.

witness, and to contradict him as to the conversation of which he has given evidence.

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Dr. Spinks. He is not a hostile witness, for he gave his evidence fairly and with no *animus* against the plaintiff. He is an adverse witness, for he did not give the evidence which the plaintiff wished him to give; but that does not entitle the plaintiff to contradict him on a collateral matter.

SIR J. P. WILDE. Dr. Spinks is right in the distinction he draws between an adverse and a hostile witness. A hostile witness is a witness who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court. The question is, whether it is competent to a party seeking to establish a will to show that an attesting witness who has been called to prove due execution, but has disproved it, has an interest one way or the other. No doubt, if the law had not required the plaintiff to call him, in consequence of the other witness having failed to prove the due execution, he would not have been called. I think it will be safer to admit than to reject Coles's evidence of the conversation with Brown relative to the execution of the will, for the Court ought to have everything before it that can assist it in determining whether Brown's statement is true or false on that subject.

The evidence was accordingly admitted, and evidence was also admitted of further conversations with Brown on the same subject, respecting which no question had been put to Brown.

Dr. Spinks, at the close of the plaintiff's case, said he did not intend to call evidence, but asked to be allowed to recall Brown, to give him an opportunity of contradicting the evidence of the other witnesses as to the conversations to which he had not been examined.

SIR J. P. WILDE allowed Dr. Spinks to recall Brown, without adopting him as his witness, to contradict the other witnesses' evidence as to those conversations.

The Court, in the result, pronounced against the will, and condemned the plaintiff in costs. (1)

(1) As to the examination in chief of an adverse attesting witness on the trial of an issue *devisavit vel non* directed by the Court of Chancery, who is called in obedience to the rule of that Court, see Tayl. Ev. pt. iii. c. iii. s. 1262, (p. 1132 of 3rd ed.); *Bowman* v. *Bowman*, 2 Mood & Rob. 501; 17 & 18 Vict. c. 125, s. 22. As to the cross examination of a witness hostile to the party calling him, see Tayl. Ev. pt. iii. c. iii. s. 1288, (p. 1157 of 3rd ed.)

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Jan. 16.

IN THE GOODS OF GREIG.

Will—Codicil—Will lost or revoked—Codicil independent of Will.

Where a will and codicil have been in existence, and the will has been revoked, the Court will not grant probate of the codicil unless it is satisfied that the testator intended it to operate separately from the will.

A testator by a testamentary paper, purporting to be a codicil to his last will and testament, bequeathed his balance at his bankers to his wife. No will could be found, although a will was proved to have been in existence, and in the testator's possession previous to the date of the codicil. The Court was of opinion, looking at the provisions of the codicil, that the testator intended it to be independent of the will, and therefore admitted it to probate until such time as the will should be found.

Woronzow Greig died on the 20th of October, 1865, without issue, leaving a widow, a mother, and two half-sisters surviving him. After his death, the following duly executed codicil, dated the 20th of November, 1857, was produced by his widow:—

"This is a codicil to my last will and testament, which is deposited with my bankers, Messrs. Herries, Farquhar & Co. I hereby bequeath to my dear wife Agnes, in the event of her surviving me, any balance of my private account with my bankers, Messrs. Herries, Farquhar & Co., St. James's Street, London, which may be due to me at the time of my death. Signed, &c." Search was made in the repositories of Messrs. Herries, Farquhar & Co., but no will could be found. There was the following entry in their ledger of deposits under the name of Mr. Greig: "1843. February 13th. A paper parcel called his will." And the following entry of discharge: "Delivered to himself 26th June, 1846." Mr. Greig died suddenly, and gave no intimation of having left a will, and no will could be found among the papers in his possession, or in any of his repositories. There was, however, a document in his handwriting purporting to be a copy of a will, dated the 11th of February, 1843. The codicil was delivered by Mr. Greig to his wife in an envelope, in 1857, and had remained in her custody up to the time of his death. One of the executors named in the copy of the will of the 11th of February, 1843, was Mr. Smith O'Brien, who had been convicted of high treason between that

date and the date of the codicil, and the other executor, Mr. M'Pherson, had gone to India.

Dr. Spinks moved for a grant of administration, with the codicil annexed, to the widow of the deceased, until such time as the will should be found. The will referred to by the codicil is probably some will subsequent to the will of 1843; for, when the codicil was executed, one of the executors to the will of 1843 could not have acted. The codicil is, however, entitled to probate, as an independent testamentary instrument.

[SIR J. P. WILDE. If the will was returned to the deceased, the presumption would arise, from its not being found at his death, that he had revoked it. The question would then be, whether the codicil could stand independent of it. Suppose the Court should be of opinion that, although it refers to the will, it is not so dependent on it that it ought to fall with it?]

Dr. Spinks. Then it would be entitled to probate as a substantive instrument.

SIR J. P. WILDE. If the will is hereafter found, it may be admitted to probate. The principle by which the Court should be guided in these cases is laid down by Sir C. Cresswell in *Grimwood* v. *Cozens.* (1) "The question is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shewn, by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." It seems to me, looking at the substance of the disposition of the codicil, that it is perfectly independent of the will, and was intended to operate separately from it. I therefore grant administration, with the codicil annexed, to the widow, until the will is found.

Attorneys: *W. & D. Rennolls.*

(1) 2 Sw. & Tr. 368; 5 Jur. (N.S.) 734.

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Jan. 23.

In the GOODS OF REID.

Scotch Will—Subsequent Scotch marriage—English Domicile at time of Death—24 & 25 Vict. c. 114.

A domiciled Scotchman made a will and afterwards married in Scotland. He subsequently acquired an English domicile which he retained until his death:—

Held, that, as the will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicile, and was entitled to probate in England.

David Alexander Reid was a native of Scotland, and he retained his Scotch domicile until March, 1861. He then removed to England, and acquired an English domicile, which he retained until his death, which took place on the 12th of May, 1865.

By an ante-nuptial settlement dated the 29th of June, 1859, the deceased disponed, made over, and conveyed to trustees the whole estate, heritable and movable, real and personal, wheresoever situated, which should belong to or be addebted to him at the time of his death, and appointed the trustees his executors. Immediately after the execution of the settlement he married in Scotland. At the time of his death he was possessed of personal property in England, and in Scotland, and he left his widow surviving him. By the law of Scotland, the ante-nuptial settlement operated as a valid testamentary instrument, and was not revoked by his subsequent marriage. On the 11th of November, 1865, confirmation of the settlement, as containing the will of the deceased, was granted to W. Johnstone and P. Johnstone, two of the surviving trustees and executors therein named. The deceased left no other will or testamentary instrument.

December 5th, 1865. *Dr. Deane, Q.C.* (*Dr. Wambey* with him), moved for a grant of probate of the settlement as containing the will of the deceased, to W. Johnstone and P. Johnstone, two of the surviving trustees therein named. He referred to Lord Kingsdown's Act. (1)

(1) 24 & 25 Vict. c. 114, s. 2.—"Every will and other testamentary instrument made within the United Kingdom, by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death,) shall, as regards personal estate be held to be

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[SIR J. P. WILDE:—The case raises a very important question. It is a well established rule of English law that the law of the testator's domicile, at the time of his death, determines the validity of his will; and it may be argued, that, as the deceased died domiciled in England, his marriage must be held to have revoked his will. I cannot decide such a question on motion unless notice is given to the next of kin.]

January, 16th, 1866. *Dr. Deane, Q.C.*, and *Dr. Wambey*, renewed the motion. When the deceased crossed the border, he brought a good will with him, and he has since done nothing to revoke it. The third section of Lord Kingsdown's Act, therefore, applies, as the deceased died since that act was passed. (2)

Dr. Swabey, for the widow, consented to the grant being made.

Cur. adv. vult.

SIR J. P. WILDE, after stating the facts, said:—The question is, whether, the deceased being a domiciled Englishman at the time of his death, his will is valid, although it is not executed in the manner prescribed by the Wills Act? And there is not, probably, any doubt that, but for Lord Kingsdown's Act, the will would be invalid. The question is, what is the effect of that act? I am of opinion that its effect is to make this a good will. The 3rd section appears to have been intended to provide for a case of this kind. Applying the other provisions of that act to the present case, it appears that at the time when the will was made it was a good will; that the deceased was married on the day after it was made, but it was still a good will, notwithstanding his marriage; that he remained domiciled in Scotland for some time, and that up to the moment when he abandoned his Scotch domicile the will was good. He afterwards changed his Scotch domicile for an English

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well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Section 3.—"No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

(2) 24 & 25 Vict. c. 114, s. 5.

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domicile, but he did nothing after he came to England which had the slightest effect on the validity of the will, either by the law of England or by the law of Scotland. If, therefore, he should be held to have revoked his will, by passing from Scotland to England, it would be impossible to say that the will was not revoked "by reason of a subsequent change of domicile." The section, therefore, directly applies to the case, and the will is valid. If, instead of marrying in Scotland, he had married in England after he had obtained an English domicile, a question of some nicety would probably have arisen. I grant probate of the will.

Attorneys: *Bird & Moore.*

Jan. 23.

IN THE GOODS OF STARK.

Administration Bond—Sureties.

Post 1660

The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them.

THE deceased died intestate in May, 1863, leaving a widow and three minor children, and administration was granted to the widow.

Dr. Spinks moved that the two sureties to the administration bond might be discharged, and that two other persons who were willing to become sureties in their place, might be substituted.

[SIR J. P. WILDE. I do not see how I can release them from the bond, for there may be liabilities already incurred, for which the proposed new sureties would not be responsible. The only way that occurs to me, in which they can be released, is by the proposed new sureties giving them a bond of indemnity.]

Dr. Spinks. I can find no precedent for the motion.

SIR J. P. WILDE. The substituted sureties would not be and could not be made responsible for any past transactions of which they might know nothing.

Motion rejected.

Attorney: *G. E. Philbrick.*

BOREHAM *v.* BOREHAM.

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Jan. 17.

*Suit for Dissolution—Adultery of Husband—Misconduct of Wife—Judicial Separation Refused—Dismissal of Petition—*20 & 21 *Vict. c.* 85, *s.* 31.

In a wife's suit for dissolution the husband was proved to have been guilty of adultery, but of no other misconduct; and the wife was proved to have been guilty of cruelty, and of wilful separation from the respondent before his adultery and without reasonable excuse, and of wilful neglect and misconduct conducing to his adultery. The Court refused to grant a decree of judicial separation on the ground of the husband's adultery, and in the exercise of its discretion, under the 31st section of the 20 & 21 Vict. c. 85, dismissed the petition.

Pow 571
2 Rob 99
3 Prob 118

THIS was a wife's petition for dissolution of marriage on the ground of adultery, coupled with cruelty and with desertion. The respondent appeared in person, and filed an answer, which in substance traversed the charges of cruelty and desertion, and alleged that the petitioner had treated him with cruelty, and had wilfully separated from him, and had, by her wilful neglect and misconduct, conduced to his adultery. The cause was tried by the Judge Ordinary, without a jury, and conflicting evidence was given by the petitioner and the respondent as to the charges of cruelty and desertion contained in the petition, and the counter charges contained in the answer. It was proved, and the respondent did not deny, that since the separation from the petitioner he had lived in adultery with another woman.

Searle, for the petitioner. Whatever opinion the Court may form upon the evidence as to the cruelty and desertion, and the counter charges, the petitioner is entitled to a judicial separation, on the ground of adultery. It has been the practice of the Court to grant decrees of judicial separation in suits for dissolution, where the evidence was sufficient to entitle the petitioner to such a decree, but was insufficient to warrant a decree of dissolution.

THE JUDGE ORDINARY found that the adultery of the respondent was proved, but his cruelty and desertion were not proved. He also found that the petitioner had treated the respondent with cruelty, that she had wilfully separated herself from him before the adultery complained of, and without reasonable excuse; and

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that she had been guilty of such wilful neglect or misconduct as had conduced to his adultery. It was the practice of the Court to grant judicial separations in unopposed cases where, although the prayer was for dissolution, the evidence only warranted judicial separation; but no such practice had hitherto prevailed in suits for dissolution where counter charges were established, giving the Court a discretion under the 31st section of the 20 & 21 Vict. c. 85, to dismiss the petition. In the exercise of the discretion vested in him by that section, he dismissed the petition.

Attorneys for petitioner: *Kent & Ede.*

Jan. 18.

SIDNEY *v.* SIDNEY.

*Appeal—Order for Permanent Provision—*20 *&* 21 *Vict. c.* 85, *s.* 32—23 *&* 24 *Vict c.* 144.

An order for permanent provision for a divorced wife, made under the 20 & 21 Vict. c. 85, s. 32, must form part of the decree dissolving the marriage. In making such an order the Judge-Ordinary exercises a power which could only have been exercised by the full Court before the passing of the 23 & 24 Vict. c. 144, and the appeal from the order lies not to the full Court but to the House of Lords.

ON the 4th of March, 1865, the Judge Ordinary pronounced a decree *nisi* in this case, dissolving the marriage on the ground of the adultery and cruelty of the husband. Before the decree was made absolute the wife filed a petition for an order under the 32nd section of the 20 & 21 Vict. c. 85, that the husband should secure to her a sum of money by way of permanent provision. The husband filed an answer to this petition, and upon the statements in the petition and answer the Judge-Ordinary estimated the joint income at 1200*l.*, and the wife's separate income at 155*l.*, and ordered that the respondent should secure to the petitioner, *dum sola et casta vixerit*, the annual income of 245*l.*, so as to make up her income to 400*l.*, or one-third of the joint income. This order formed part of the decree absolute. (1) The respondent appealed from this order to the full Court. (2)

(1) *Sidney* v. *Sidney*, 34 L. J. (P. M. & A.) 122.

(2) The Judge Ordinary, Pigott, B., and M. Smith, J.

Keane, Q.C. (*F. H. Lewis* and *Searle* with him) for the appellant. The question upon which the appellant wishes to take the opinion of the Court of Appeal is whether the Judge Ordinary is right in dealing with orders for permanent provision upon decrees for dissolution of marriage, upon the same principle as orders for permanent alimony upon decrees for judicial separation. But there is some doubt whether the appeal lies to the full Court or to the House of Lords. The 9th section of the 20 & 21 Vict. c. 85 empowers the Judge Ordinary of the court "to hear and determine all matters arising therein, except petitions for the dissolving of, or annulling marriages, and applications for new trials of questions, or issues before a jury, bills of exception, special verdicts and special cases, and except as aforesaid," to exercise all the powers and authority of the said Court. The 55th section gives an appeal from any decision of the Court "in any matter which, according to the provisions aforesaid, may be made by the Judge Ordinary alone," to the full Court, whose decision is to be final. The 56th section gives an appeal from the decision of the full Court "on any petition for the dissolution of a marriage" to the House of Lords. The 32nd section enacts that "the Court may, if it shall think fit on any such decree" (dissolving a marriage) "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money," &c. It has been the practice of the Court to make the order under this section part of the decree absolute. If it is necessarily part of the decree absolute the appeal is probably to the House of Lords; but if it is not within any of the exceptions in the 9th section, and might under the 20 & 21 Vict. c. 85 have been made by the Judge Ordinary sitting alone, the appeal is to the full Court. The subsequent act (23 & 24 Vict. c. 144), which empowers the Judge Ordinary to exercise all the powers theretofore vested in the full Court, does not affect this question, for the 3rd section enacts that where there is a right of appeal to the House of Lords from the decision of the full Court, there shall be the like right of appeal to the said House from the decision of the Judge Ordinary alone under that act.

Dr. Spinks (*M. Williams* with him) for the petitioner. Although

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the order forms part of the decree, it is founded upon pleadings and evidence which are quite independent of the pleadings and evidence in the suit, and which are not brought before the Court until after the decree *nisi*; and it may therefore be treated as separate and distinct from the decree.

THE JUDGE ORDINARY. We are all of opinion that the appeal does not lie to the full Court. If the House of Lords should determine that we are wrong in that opinion, the appellant will have no difficulty in bringing the matter before us again. At the time when the first act passed, a certain jurisdiction was confided to the full Court, and a more limited jurisdiction was confided to the Judge Ordinary sitting alone. In matters over which the full Court had jurisdiction an appeal was given to the House of Lords, and in matters over which the Judge Ordinary alone had jurisdiction an appeal was given to the full Court, whose decision was to be final. Subsequently, all the powers of the full Court were handed over to the Judge Ordinary alone, but it seems to me that in all the matters over which the full Court originally had jurisdiction, the appeal from the decision of the Judge-Ordinary lies to the House of Lords only. In making the order now appealed from, the Judge Ordinary exercised one of the functions which could only be exercised by the full Court before the passing of the 23 & 24 Vict. c. 144, and consequently an appeal lies to the House of Lords and not to this Court.

PIGOTT, B., concurred.

M. SMITH, J. An order made under the 32nd section must form part of the decree for dissolution, and that decree is made by the Judge-Ordinary, representing the full Court. The appeal is therefore to the House of Lords.

Attorney for appellant: *Sidney.*

Attorneys for petitioner: *Lewis & Lewis.*

COLEMAN *v.* COLEMAN.

1866.
Jan. 26

Dissolution of Marriage—Prostitution of Petitioner by coercion of Respondent—20 & 21 Vict. c. 85, s. 31.

In a suit by a wife for a dissolution of marriage it was proved that the respondent had been guilty of adultery and of cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she obtained by prostitution. The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the respondent, exercised the discretion given to it by the 31st section of the 20 & 21 Vict. c. 85, by dissolving the marriage, notwithstanding her adultery.

Ante 645, 3 P. & M. 116 — 2 Sw. & Tr. 238.

THIS was a wife's petition for dissolution of marriage, on the ground of adultery, coupled with cruelty. The petition, after alleging the marriage and cohabitation, and divers acts of cruelty, went on to allege that in the year 1860 the petitioner and the respondent were in very distressed circumstances; that the respondent vehemently urged her to obtain money by prostitution, and threatened her with personal violence if she persisted in refusing to do so; that a long course of close confinement, hard work, and scanty and indifferent food, had injured her health and broken her spirit, and she was, consequently, reduced to a state of great bodily fear and alarm by the constant threats of violence and even murder which the respondent used towards her; that, under the circumstances, she was at length compelled, in the year 1860, by the violence of the respondent, to commit adultery with divers persons, by resorting to prostitution as a means of a livelihood; that she gave the respondent all the money which she obtained in this manner, and he spent nearly the whole of it upon himself, in drunkenness and debauchery. It also alleged divers acts of adultery in and since 1863. The respondent did not appear.

Inderwick, for the petitioner.

The petition came on for hearing before the Judge Ordinary. It appeared that the marriage took place in March, 1858. The petitioner gave evidence in support of the charge of cruelty, and stated that, after the marriage, she cohabited with the respondent at different places in Hackney; that the respondent

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had no occupation; and that they lived by letting lodgings. He began to illtreat her about three weeks after the marriage; and he frequently beat her, knocked her down, and threatened to murder her. At the end of two years he sold off all the furniture which she had bought, left her, and was absent for about two years, during which he did not contribute anything towards her support, and she earned her living by needlework and dressmaking. In 1861, he resumed cohabitation with her. She said: "He did nothing, and lived upon my earnings. I tried to support him by dressmaking. He said I must go on the streets, and get money for him by prostitution. I refused to go. He insisted that I should go. I begged and entreated him to get work, and to help me to get a living, but he would not. He used threats to me. He said there was nothing left for it but my going on the streets, and he would murder me if I did not. We were in great want, and the landlord had threatened to seize for rent. He took me out into the streets, and waited till I had received money from gentlemen, and took the money away from me, and I went home. He saw me crying, and laughed at me. He made me dress myself, and took me into the streets day after day, and he lived on the proceeds of my prostitution. He used to spend the money I gave him in drinking and gambling. When I refused to go out, he illtreated me, and beat me, and knocked me down. This went on for seven or eight months, until at last, in 1863, I was so miserable that I left him, and went to my brother's. I was not a consenting party to this mode of life. It was forced on me by his violence. I was in constant terror of him. I went to my brother's because I wanted to be saved from the wicked life I was leading." The petitioner further stated that after she had been a day or two at her brother's house, the respondent followed her there; that she tried to escape from him, but he knocked her down, and made her insensible, and took her home; that he tried to force her to go upon the streets again, but she refused, and did not go; that, in consequence of her refusal, he frequently beat her, and treated her with great cruelty; and that, at the end of three months, finding that she persisted in her refusal, he let her leave him, and she went to her brother's, where she had remained ever since. Her evidence as to the respondent's cruelty was corroborated by her

brother and other witnesses; and it was proved that he had been guilty of adultery since she separated from him.

THE JUDGE ORDINARY. The cruelty is fully proved. I am satisfied that the respondent illtreated his wife; and the evidence which I thought proper to admit as to the life which the petitioner for some time led was, in my opinion, admissible in support of the charge of cruelty. It is also very plainly proved that the respondent has been guilty of adultery; and the petitioner's case is, therefore, made out. But it appears on the face of the petition, and it was also stated by the petitioner in the witness-box, that she had on many occasions committed adultery. This renders it necessary to consider the effect of that section in the statute which applies to such a state of things. The 31st section enacts that, "in case the Court shall be satisfied, on the evidence, that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to, or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: provided always that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the marriage, been guilty of adultery." The Court does so find, and, therefore, it is not bound to grant the decree prayed. But the language of the section obviously imports that the Court must be guided, in granting or withholding a decree, by the circumstances of the case, and that it has a discretion to exercise in the matter. Now it is a familiar principle in the criminal law, subject to certain well-known exceptions, that if a husband and wife, acting in concert together, are guilty of a criminal act, the wife is by law presumed to be acting under the influence of the husband, and is, consequently, excused from the consequences of such criminal act. And that merciful presumption is raised by the law without any special evidence to show that there was any influence used on the part of the husband. I think that principle may very reasonably be called in aid to solve any difficulty that may seem to arise in the present case, and to guide the discretion of the Court. But

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the case does not rest merely on the legal presumption that, as the husband had control over the wife, the acts of adultery which she committed must have been committed in concert with him; for it is proved to my entire satisfaction, not only that they were committed in concert with him, but that they were committed under such circumstances that she was not a willing agent. I have come to the conclusion that she was terrified by threats and constant ill-usage into leading a life of immorality for his profit, contrary to her own will and desire. I think, therefore, that, in the exercise of my discretion, I ought not to refuse to grant a decree dissolving her marriage with a man who has so grossly illtreated her.

Decree nisi, with costs.

Attorney for petitioner: *J. Tucker.*

IN THE GOODS OF HOUSTON.

1865
Dec. 12.

Administration Bond—Sureties resident in Scotland.

Where the administrator was the only person beneficially interested in the estate of the intestate, and there were no creditors, the Court allowed the bond to be given with two sureties resident in Scotland.

4 P.D. 229
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Charlotte Henrietta Houston died in India, intestate, on the 9th of May, 1863, leaving her husband, J. M. Macdonald Houston, M.D., of Doomoogodnir, in the Madras Presidency, surviving her. She was possessed of personal estate and effects, under the value of 800*l.* J. M. Macdonald Houston duly appointed Arthur Mitchell, physician, of Edinburgh, his lawful attorney, for the purpose of taking out administration of the personal estate and effects of the deceased. A. Mitchell filed an affidavit, wherein he stated that it was inconvenient to him to find two sureties resident in England for the due administration of the estate.

Dr. Spinks moved for an order that A. Mitchell might be allowed to give a bond with two sureties resident in Scotland instead of in England. The sureties are intended for the protection of creditors, and of persons interested in the estate. The intestate being a married woman at the time of her death could have no creditors, and the administrator is the only person interested in the estate. By the 81st section of the 20 & 21 Vict. c. 77, the Court has power to dispense with sureties altogether.

Sir J. P. Wilde. In a recent case (1), the Court declined to accept sureties to an administration bond resident in Scotland, but a greater latitude may be allowed in a case like the present, where the deceased has no creditors, and the administrator is the only person beneficially interested in the estate.

Motion granted.

Attorneys: *Young, Maples, Teesdale, & Nelson.*

(1) *Herbert* v. *Sheil*, 3 Sw. & Tr. 479; 33 L. J. (P. M. & A.) 142. *In the Goods of Reed*, 3 Sw. & Tr. 439.

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Dec. 12.

PATRICKSON *v.* PATRICKSON.

Dissolution of Marriage—Evidence.

In a suit for dissolution, formal proof of the marriage is not indispensably necessary, but sufficient evidence must be produced to satisfy the Court of the fact of the marriage.

Evidence that a man and woman residing at S. had left S., together, stating that they intended to get married at G.; that they had returned to S. and stated that they had been married at G.; and that they afterwards cohabited for many years at S. as husband and wife:—

Held, no better evidence being procurable, to be sufficient proof of the marriage.

THIS was a husband's petition for dissolution of marriage. The respondent appeared but did not answer. The petitioner had obtained leave to proceed without a co-respondent. The petition came on for hearing before the Judge Ordinary on the 10th of November.

Dr. Spinks for the petitioner.

The petition alleged a marriage on the 18th of May, 1850, at Gretna Green, and subsequent cohabitation at Sebergham, in Cumberland, and adultery in 1863, with a person unknown. The only question in the case was, whether there was sufficient evidence of the marriage. The evidence on that point was in substance as follows:—James Murray proved that he was the son of John Murray, who used to marry a great number of persons every year, at Gretna Green, and to enter the names of the persons so married in a book which he called his register book; that John Murray died five years ago; that the book produced was one of John Murray's register books, and that an entry in the book of a marriage between Joseph Patrickson and Ann Rawson on the 18th of May, 1850, was in John Murray's handwriting, and signed by him. He also described the forms which John Murray observed in celebrating marriages, and it was proved by a Scotch advocate that those forms constituted a valid marriage according to the law of Scotland. The entry in the book was signed by the petitioner, and by two witnesses, and by a cross, purporting to be the mark of Ann Rawson. The signature of the petitioner was proved to be

genuine, and evidence was given that search had been made for the two witnesses, and neither of them could be found. Mrs. Connelly, a sister of the respondent, deposed that she remembered the petitioner and respondent leaving Sebergham in May, 1850, for the purpose of getting married at Gretna Green; that they returned to Sebergham and stated that they had been married at Gretna Green, and that they afterwards lived for many years as husband and wife at Sebergham.

[THE JUDGE ORDINARY. As the respondent signed the book with a mark, her signature cannot be proved. The book is not, therefore, evidence against her, although it would be evidence against the petitioner. She is not identified as the woman who was married at Gretna, and the entry in the book cannot be read.]

It is proved that she went with him to Gretna for the purpose of being married, and returned and lived as his wife. The evidence is the best which it is in the petitioner's power to produce.

[THE JUDGE ORDINARY. I will consider whether I can grant a decree without violating any technical rule of evidence.]

Cur. adv. vult.

THE JUDGE ORDINARY. The adultery was plainly proved, and the only question reserved for the consideration of the Court was, whether there was sufficient proof of the marriage. It took place at Gretna Green, and on the trial a book was produced, kept by the person who professed to celebrate, or to be a witness to such marriages, containing an entry stating that the parties had been married on a certain day, which was signed by the petitioner. It was also proved that the petitioner and the respondent had gone from their homes at Sebergham, where they had lived up to the time of the marriage, for the purpose of being married on a certain day at Gretna; and also that they had come back from Gretna stating that they had been married, and had from that time lived together as man and wife. Without going into the question of how far the entry in the book could be made evidence against the wife, as it clearly could be against the husband, for he signed it, I think the Court has sufficient evidence before it to satisfy it that there was a marriage. The parties went away to be married,

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they returned and lived together as man and wife, and on the very day when they went away there is an entry of a marriage in the book, signed by the husband. I therefore pronounce a decree *nisi*, dissolving the marriage.

Attorney: *F. Johnston.*

Feb. 6.

IN THE GOODS OF DOBSON.

Will, not Contingent.

A will commencing with the words, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c., held, not to be contingent upon the event of the testator's death on the journey he was about to take when the will was executed.

1 P.D. 381
2 P.M. 23.
18 L.T. 210
6 P.D. 18

WILLIAM DOBSON died on the 21st day of November, 1865, leaving a will of the 29th of January, 1863, which commenced with the following words:—"January 29th, 1863. Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property to," &c. &c. The testator did not die upon the journey which he took immediately after executing this will, and a question was raised in the registry whether it was contingent on that event.

Dr. Spinks moved for a grant of administration with the will annexed. The will is not contingent, but merely means—As my life is uncertain, especially as I am about to travel by railway, I make my will. He cited *Strauss* v. *Schmidt* (1); *Burton* v. *Collingwood.* (2)

SIR J. P. WILDE. I am unwilling to refuse probate of a testamentary paper on the ground that it was contingent, unless it is clear that the testator intended that it should operate only in a certain event, or during a certain period. *In the Goods of Winn* (3) was a case in which the Court felt constrained to hold that the will was contingent. In that case the words were: "Being on the

(1) 3 Phillim. 217. (2) 4 Hagg. 176. (3) 2 Sw. & Tr. 147.

7 Jur. N.S. 764

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IN THE GOODS OF DOBSON.

eve of embarking for San Francisco, South America, or Mexico, I do hereby, in the case of my decease during my absence being fully ascertained and proved, do and will over the whole of my furniture, &c., or any property of whatsoever description," &c. *Parsons* v. *Lanoe* (1) was cited in that case, and both were instances in which the Court saw, that the testator had expressly limited the operation of the will to a certain time, and accordingly refused probate of it. But this case goes by no means so far. The testator's meaning seems to me to have been this: "My mind is drawn to the consideration that all railway travelling is attended with danger, and therefore I think I had better make my will." Administration with the will annexed will therefore be granted.

Attorney: *Parker.*

Feb. 13.

BUSHELL *v.* BLENKHORN.

Trial of Issues at Assizes—Order as to Mode of Trial—20 & 21 *Vict. c.* 77, *ss.* 35 & 38—17 & 18 *Vic. c.* 125, *s.* 1—*Trial without Jury—Practice.*

The Court of Probate has no power to order the issues in a testamentary cause to be tried by a judge of assize without a jury.

THE plaintiff in this case propounded a will, pleas had been filed contesting its validity, and issue had been joined.

Bayford, for the plaintiff, moved for an order that the issues might be tried at the next assizes for Lancashire by a judge without a jury. He referred to 20 & 21 Vict. c. 77, ss. 35 and 38 (2), and to the *Common Law Procedure Act*, 1854, (17 & 18 Vict. c. 125) s. 1, which enables the parties to a cause, by consent in writing,

(1) 1 Ves. Sen. 190.

(2) 20 & 21 Vict. c. 77, s. 35. "It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceedings under this Act to be tried by a special or common jury before the Court itself, or by means of an issue, to be directed to any of the superior courts of common law in the same manner as an issue may now be directed by the Court of Chancery," &c.

Sec. 38. "Where the Court of Probate directs an issue it shall be lawful for such Court to direct such issue to be tried either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury in like manner as is now done by the Court of Chancery."

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signed by them or their attorneys, to leave the decision of any issue of fact to the Court, provided that the Court or a judge shall, in their or his discretion, think fit to allow such trial.

SIR J. P. WILDE. I have no power to order an issue to be tried by a Judge of Assize without a jury. I order the issues to be tried at the Lancashire Spring Assizes by a common jury. If both parties wish to have the cause tried without a jury, they will probably be able to effect their object by making an application to the Judge of Assize.

Attorney: *H. Norris.*

Feb. 13.

IN THE GOODS OF HALLYBURTON.

Will of Married Woman made under Power—Testatrix domiciled Abroad—Will invalid by law of Domicile.

A will made in Scotland in the English form by a married woman domiciled in Scotland, purporting to be made under a power and disposing of property in England, held, on the authority of *In the Goods of Alexander* (1), to be entitled to probate, although not valid according to the law of Scotland:—

Quære, whether the decision in *In the Goods of Alexander* (1) be right?

THE Right Hon. Augusta Frederic Gordon Hallyburton, commonly called Lady Hallyburton (wife of Lord John Hallyburton), died on the 8th December, 1865. She was a domiciled Scotchwoman. On the 3rd of August, 1855, she duly executed a will in Scotland in the English form, and on the 31st of January, 1856, she duly executed a codicil thereto, in England, in the English form and holograph. She also made a second codicil on the 2nd of December, 1865, in Scotland, in the English form. The will and codicils purported to be made in the exercise of certain powers of appointment contained in a settlement of the 23rd of August, 1836, made upon the marriage of the testatrix with Lord Hallyburton, and in a settlement made on the 13th of May, 1837, between his late majesty King William IV. of the first part, and the testatrix and others of the second and third parts, and in the will of his late majesty King William IV., dated the 3rd of May, 1837.

(1) 29 L. J. (P. M. & A.) 93; note to *Crookenden* v. *Fuller*, 1 Sw. & Tr. 454; 29 L. J. (P. M. & A.) 1.

The property of which the will and codicils disposed was situated in England.

Feb. 6. *Wotherspoon* moved for probate of the will and two codicils, limited to all such personal estate as the testatrix, by virtue of the indentures of settlement of the 23rd of August, 1836, and of the 13th of May, 1837, and of the will of the 3rd of May, 1837, and of all other powers and authorities her enabling, had a right to appoint or dispose of, to G. D. Ramsay and the Hon. G. B. B. Ponsonby, the executors named in the second codicil. The first codicil having been executed in England in the manner prescribed by the Wills Act, is made valid by Lord Kingsdown's Act (24 & 25 Vict. c. 114), and being holograph, it is also valid by the law of Scotland. As that codicil republishes and confirms the will of the 3rd of August, 1855, the will and codicil are clearly entitled to probate. But a question arises as to the second codicil, which was executed in Scotland by a domiciled Scotchwoman, in the form prescribed by the Wills Act, and which is not valid by the law of Scotland. As it is executed under a power it is entitled to probate on the authority of *In the Goods of Alexander* (1), where Sir C. Cresswell, correcting an opinion which he had expressed in the earlier case of *Crookenden* v. *Fuller* (2), held that a will made in the English form in pursuance of a power was entitled to probate, although not valid as a will by the law of the testatrix's domicile.

Cur. adv. vult.

Feb. 13. SIR J. P. WILDE. This was an application for probate of a will and two codicils, purporting to be made in the exercise of certain powers therein recited, by a married woman. No question arises as to the will and the first codicil. The testatrix was a domiciled Scotchwoman, and that codicil is valid by the law of Scotland, and, as it republishes the will, the Court has no hesitation in granting probate of those two papers. But a question arises as to the second codicil, which was made by the testatrix, being a domiciled Scotchwoman, in a form not valid according to

(1) 29 L. J. (P. M. & A.) 93; note to *Crookenden* v. *Fuller*, 1 Sw. & Tr. 454. See also *Dodd's Practice of the Court of Probate*, 226.

(2) 1 Sw. & Tr. at p. 454; 29 L. J. (P. M. & A.) at p. 8.

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the law of Scotland. Having been made in Scotland, the question of its validity is not affected by Lord Kingsdown's Act, and, under ordinary circumstances, it would not be valid as a will in England. But I am asked to grant probate of it on the authority of *In the Goods of Alexander.*(1) Now, I cannot say that there is any distinction between that case and the present, and I feel so strongly the importance of upholding a decision upon such a question until it is overruled by a court of appeal, that I intend to follow it. Great injustice might arise if I were to do otherwise, because, for aught I know, the attorney who drew the will in this case may have acted on the authority of that very decision. But I cannot help saying, that after reading the case of *Tatnall* v. *Hankey* (2), and the later case of *Barnes* v. *Vincent* (3), in the Privy Council, I have a strong impression that Sir C. Cresswell was right in the opinion which he expressed on this question in *Crookenden* v. *Fuller* (4), and that the note, upon which he acted in the case of *Alexander*, of the decision of the Judicial Committee, which does not appear in the report in Moore, is at variance with the subsequent case of *Barnes* v. *Vincent.*(3) Both *Tatnall* v. *Hankey* (2) and *Barnes* v. *Vincent* (3) appear to me to decide, that where a will is executed under a power, the Court of Probate must determine whether or not there is a will. They both imply that the Court of Probate is not to look at the power, and to ask itself whether what has been done is in conformity with the power, but that it is to look at the form in which the will has been executed, and to say whether it is a good will. *Barnes* v. *Vincent* (3) further decides (which *Tatnall* v. *Hankey* (2) perhaps does not), that the Court of Probate is to shut its eyes to the question whether or not the testatrix was testable, that is, whether, being a married woman, she had the power which she professes to have exercised. After going through all the cases, the Privy Council came to the conclusion, that so important is it that the Court of Probate should not exercise an opinion on the question, and by refusing probate of such an instrument prevent the Court of Chancery from taking notice of it, that it would be better for the Court of Probate, in all cases in which a power is

(1) 29 L. J. (P. M. & A.) 93; note to *Crookenden* v. *Fuller*, 1 Sw. & Tr. 454.

(2) 2 Moo. P. C. 342.

(3) 5 Moo. P. C. 201.

(4) 1 Sw. & Tr. 454; 29 L. J. (P. M. & A.) 1.

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alleged to have been exercised, to take the power for granted, and assume that the testatrix was testable, and grant probate of the instrument. But *Barnes* v. *Vincent* (1) seems to throw on the Court of Probate the duty of enquiring whether the instrument is a will or not. The Court has no means of knowing whether a will has been duly executed except by enquiring, where the English law is applicable, whether it has been executed according to the Wills Act, and where the law of a foreign country is applicable, whether it has been executed according to the law of the place of domicile, or foreign country. But the case of *Alexander* seems to decide that the Court is to do neither the one nor the other; and withdraws from this Court all standard by which to try the validity of the supposed will, except the term of the power, into which the Court is by the case of *Barnes* v. *Vincent* (1) forbidden to inquire. Although I feel this difficulty, I think I am bound to follow the decision in the case of *Alexander*, and I therefore grant probate of the will and two codicils as prayed.

Attorneys: *Thomas Moore & Skeet.*

MALLINSON *v.* MALLINSON.

Feb. 1.

Judicial separation — Desertion — Offer to return — Adultery of Respondent — Cross-examination of Respondent as to adultery.

Where the answer to a petition alleging desertion merely traverses the charge, evidence is not, in strictness, admissible of an offer to return subsequent to the alleged desertion; nor is evidence admissible of facts shewing the insincerity of such offer to return. The offer to return should be pleaded in the answer, and the facts relied upon to shew its insincerity should be pleaded in the replication.

Where the respondent, in a suit by a wife for judicial separation on the ground of desertion, was called to prove that he had made the petitioner an offer to return to cohabitation before her right to a judicial separation had accrued, the Court allowed questions to be put to him in cross-examination, tending to shew that at the time when the alleged offer was made, he was adulterously cohabiting with another woman.

EMMA MALLINSON alleged that her husband, John Mallinson, had been guilty of desertion, without cause, for two years and upwards. The respondent filed an answer, traversing that charge,

(1) 5 Moo. P. C. 201.

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and the cause came on for hearing before the Judge Ordinary without a jury.

Dr. Swabey, in opening the petitioner's case, stated that an attempt would be made by the respondent to prove that before the expiration of two years from the date of the desertion he made an offer to return to cohabitation; but it would be shewn that such offer, if made at all, was not bonâ fide, as, at the time when the respondent was supposed to have made it, he was cohabiting with another woman.

Dr. Spinks, for the respondent. There is no charge of adultery, and that evidence is inadmissible.

Dr. Swabey. It is admissible, to shew that the offer to return was not bonâ fide. As the respondent's answer is a mere traverse, he has no right to shew that he made an offer to return, if we are to be confined strictly to the pleadings. If he is at liberty to shew that there was an offer to return, the petitioner is at liberty to shew that it was not bonâ fide.

[The JUDGE ORDINARY. The respondent merely traverses the desertion, and does not go on to say, "If I did desert, I subsequently made an offer to come back." If he had done so, the petitioner would have replied, "Yes, but you had then committed adultery, and I was not bound to receive you." The pleadings neither raise the question of the offer, nor of the answer to the offer. If need be, they must be amended. If the petitioner establishes the desertion charged, and the respondent does not establish a subsequent bonâ fide offer to return, the adultery will be immaterial.]

The evidence of the petitioner proved that the marriage took place in May, 1844; that the parties cohabited at Huddersfield from that date until October, 1854, and had children; that in October, 1854, the respondent went to Scotland, leaving the petitioner at Huddersfield, and that he never afterwards cohabited with her or contributed to her support; that he did not make her any offer to return to cohabitation until August, 1864, shortly before the death of her father; and that on the death of her father she came into possession of an income of between 600*l.* and 700*l.* a year.

The respondent was called to prove that he had made an offer

to return to the petitioner on divers occasions previous to 1858, when her right to a judicial separation for desertion accrued. (1)

In cross-examination, *Dr. Swabey* asked the respondent whether, at the time when the alleged offer to return was made, he was living in adultery with another woman.

Dr. Spinks objected.

Dr. Swabey. I have a right to cross-examine the respondent as to his adultery or any other matter, now that he is in the witness-box. It is material to shew, that even if he did make an offer to return before 1858, it was not a bonâ fide offer, because he was living in adultery at the time when it was made.

Dr. Spinks. If the question is put, the witness is not bound to answer it, as he is liable to ecclesiastical censure for adultery, and he is not obliged to criminate himself.

[THE JUDGE ORDINARY. I cannot resist Dr. Swabey's argument, that the mode of life of the respondent at the time the offer is alleged to have been made is material, as shewing whether or not the offer was sincere. I think, therefore, that the question may be put.]

The witness did not decline to answer the question, but admitted that at the time when the alleged offer was made he was living in adultery with another woman.

The Court ultimately came to the conclusion that the respondent did not make any offer to return to cohabitation with the petitioner until 1864, after the right to a judicial separation had accrued, and after he had committed adultery.

Judicial separation decreed.

Attorneys for petitioner: *Edwards, Layton, & Co.*

Attorneys for respondent: *Lewis & Lewis.*

(1) See *Cargill* v. *Cargill*, 1 Sw. & Tr. 235; 27 L. J. (P. M. & A.) 69; and *Brookes* v. *Brookes*, 1 Sw. & Tr., 326 28 L. J. (P. M. & A.) 38.

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WHITMORE *v.* WHITMORE.

Alimony—Costs—Intervention of Queen's Proctor—Dismissal of Wife's Petition.

A wife obtained a decree *nisi* for the dissolution of her marriage, with costs against the respondent. Before that decree was made absolute, the Queen's Proctor intervened, and filed affidavits proving that she had committed adultery whilst the suit was pending, and the decree was thereupon rescinded, and the petition dismissed:—

Held, that the wife, having obtained an order for alimony *pendente lite*, was entitled to an attachment against the respondent for nonpayment of the arrears of alimony up to the date when she was found guilty of adultery.

Held, also, that she was entitled to enforce the payment by the respondent of all costs which had been taxed, and ordered to be paid up to the same date, including the costs of the hearing, although they had not been taxed.

The petitioner, Mrs. Whitmore, alleged that her husband had been guilty of adultery and cruelty, and prayed for a dissolution of marriage. The respondent filed an answer denying those charges, and making counter-charges against her, and the cause was heard by the Judge Ordinary and a common jury on the 8th of July, 1865. The respondent did not appear by counsel at the hearing, evidence was produced in support of the allegations in the petition, a verdict was returned for the petitioner on all the issues, and a decree *nisi* was pronounced with costs against the respondent. On the 7th of November, 1865, the Queen's Proctor intervened. Affidavits were afterwards filed by him shewing that whilst the petition was pending the petitioner had been guilty of adultery, and that on the 20th of October, 1865, she had given birth to a child. On the 16th of January, 1866, the *Solicitor-General* (*Dr. Spinks* with him), on behalf of the Queen's Proctor, moved that the decree *nisi* might be rescinded, and the petition dismissed. *Pritchard*, for the petitioner, admitted that the petitioner was unable to answer the affidavits filed by the Queen's Proctor, but asked that the motion for the dismissal of the petition might be allowed to stand over, in order that the petitioner might have an opportunity of making an application to the Court respecting arrears of alimony and costs. The motion stood over by leave of the Judge Ordinary for that purpose.

Jan. 23. *Pritchard* moved for an attachment against the respondent for nonpayment of the arrears of alimony *pendente lite* from the 5th of July, 1865, to the 16th of January, 1866.

Dr. Twiss, Q.C. (*Dr. Wambey* with him), for the respondent, opposed the motion. The petitioner has admitted the truth of the affidavits filed by the Queen's Proctor, shewing that on the 5th of July, 1865, she had been guilty of adultery, and from the moment when she commits adultery her right to alimony ceases: *Latham* v. *Latham* (1); *Wells* v. *Wells* and *Hudson*. (2)

[THE JUDGE ORDINARY. *Wells* v. *Wells* (2) decides that the wife's right to alimony ceases when her adultery is proved: you say it ceases when the adultery is committed. Your argument would get rid of alimony *pendente lite* altogether.]

Her right ceased at any rate at the date of the decree *nisi*.

[THE JUDGE ORDINARY. The wife was successful in the suit as against the husband. The adultery proved by the Queen's Proctor was not adultery charged by the husband in the suit, but was committed after the commencement of the suit.]

When the cause was heard, and the decree pronounced, the wife had committed adultery, and the decree was obtained by fraud. The Court will not, therefore, give her any assistance in enforcing her demand for alimony.

Pritchard in reply. It is the daily practice to allow alimony to a wife charged with adultery up to the moment when her guilt is proved.

[THE JUDGE ORDINARY. No doubt she could have enforced the order before her guilt was proved. The question is whether she can enforce it after her guilt has been proved.]

The husband cannot take advantage of his own *laches* in neglecting to obey the order. There is another question as to costs. The Court will not reverse that part of the decree *nisi*, which condemns the respondent in the petitioner's costs. The question is not between the wife and the husband, but between the wife's solicitor and the husband.

[THE JUDGE ORDINARY. I always refuse to take that view of it.]

The wife proved all the allegations in her petition, and until she committed the adultery charged by the Queen's Proctor,

(1) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163; 7 Jur. N. S. 218

(2) 3 Sw. & Tr. 542; 33 L. J. (P. M & A.) 151; 10 Jur. N. S. 755.

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subsequent to the commencement of the suit, she was entitled to a decree. The wife's solicitor ought not to be deprived of his costs in consequence of something that occurred after his right to them accrued, and of which he could have no knowledge. As far as the respondent is concerned, the wife is a successful suitor.

Cur. adv. vult.

Jan. 30. THE JUDGE ORDINARY. I reserved this case for consideration on two points. Mrs. Whitmore instituted a suit for dissolution, in which she charged her husband with adultery and cruelty. The husband put in an answer, but did not appear at the trial, and the result was, that the jury, after hearing the evidence in support of the petition, found a verdict for the petitioner on both issues, and a decree *nisi* was granted, which condemned the respondent in costs. Long after the decree *nisi* was pronounced, but before it was made absolute, the Queen's Proctor intervened, and affidavits were filed, distinctly charging the petitioner with having committed adultery while the suit was going on. She was unable to answer those affidavits, and on the 16th of January, when those affidavits were brought before the Court, she admitted by her counsel the adultery charged against her. Two questions arose on this state of things; first, what was the amount of alimony of which she could enforce payment from the respondent? Secondly, what was the amount of costs of which she could enforce payment from the respondent?

First, as to the alimony. Her claim was for arrears of alimony, from the 5th of July, 1865, to the 16th of January, 1866, when she confessed her adultery. It seems to me, that an order having been made for alimony, that order must be enforced, and the husband must pay it. If the petitioner had come to the Court to ask for alimony at any time subsequent to her confession of adultery, the Court would have given her no assistance; but she has obtained an order for alimony, and if the Court should decline to enforce that order, it will hold out a premium to all persons upon whom such orders are made to refuse obedience to them as long as possible, in the hope that something may turn up to relieve them from the obligation of payment. I therefore order an attachment to issue for the nonpayment of the arrears of alimony up to the 16th of January.

Secondly, as to the costs. *Keats* v. *Keats and Montezuma* (1) is an authority for the proposition, that after a wife has been proved to be guilty of adultery, it is too late for her to tax her costs against the husband, and that decision has ever since been acted on.

From the moment therefore when Mrs. Whitmore was proved to have committed adultery, it was too late to ask for an order to have the costs taxed; but she is entitled to enforce any order she has already obtained. She will, therefore, have all the costs for which she obtained orders up to the 16th of January, but she is entitled to no costs for which she had not obtained orders previous to that date. She will be entitled to the costs of the hearing out of the sum deposited in the registry to meet those costs. (2)

March 6. The *Queen's Advocate* and *Pritchard*, for the petitioner, moved that the order as drawn up by the Registrar might be varied, so as to include all costs which had been ordered to be taxed, as well as those which had been ordered to be paid up to the 16th of January. The order ought to include all the costs in which the respondent was condemned by the decree *nisi*, beyond the sum paid into the registry, although they have not been taxed.

Dr. Wambey (*Dr. Twiss, Q.C.*, with him), contrà.

The JUDGE ORDINARY. The principle which I laid down as applicable to this case is stated in this sentence of my judgment: "From the moment Mrs. Whitmore was proved to have committed adultery, it was too late to ask for an order to have her costs taxed; but she is entitled to enforce any order she has already obtained." If my attention had been called at the time to the different classes

(1) 1 Sw. & Tr. at p. 358; 28 L. J. (P. & M. & A.) at p. 79.

(2) An order was drawn up by the Registrar for an attachment against the respondent, for nonpayment of 67*l.* 10*s.*, being the arrears of alimony pending suit, due to the petitioner on the 5th of January, 1866, and a further order "that all costs of the petitioner, of and incidental to the trial and hearing of this cause, to the extent of the sum paid and secured by the respondent to cover such costs, and also all other costs of the petitioner which had been taxed, and ordered to be paid before the 16th of January, 1866, when the said Eliza Whitmore was shewn by the affidavits filed in this cause to have committed adultery, be paid by the said William Whitmore, the respondent, notwithstanding such adultery; and the Judge Ordinary directed that the costs of the petitioner, of and incidental to the said writ of attachment, and order for payment of costs, be taxed by one of the registrars of Her Majesty's Court of Probate," and further ordered the decree *nisi* to be rescinded, and the petition dismissed.

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into which the costs fall, I should probably have said something which would have made my meaning clearer as to the application of that principle. Before a suit is tried, the wife is entitled, according to the practice of the Court, to a sufficient sum of money to enable her to carry on the suit; and her costs are, consequently, taxed from time to time, and, when taxed, are ordered to be paid by the husband. It sometimes happens that a wife has money of her own, or that there is some other reason why the husband should not pay costs pending the suit, and before his guilt is proved; and in such cases an order to tax is frequently made, and is not followed up by an order to pay. When the order for taxation is opposed, the Court generally says that an order for taxation at least must be made, in order that it may see the amount of the costs, and may form an opinion of the husband's ability to pay them. That is the mode of proceeding as to the costs pending the suit. In this case, there is an order in the decree *nisi*, made after the hearing, that the husband be condemned in costs. When the Court, after the guilt of the husband has been proved, condemns him in costs, it goes on to direct that these costs shall be taxed, not for the purpose of enabling it to determine whether they ought to be paid, but for the purpose of their being paid. That order being in existence, ought to be enforced, and the wife must have the costs to which it refers. She will be at liberty, therefore, now to tax these costs, and they must be paid by the respondent. She is also entitled to the costs of this application. (1)

Attorney for petitioner: *H. C. Barker.*
Attorneys for respondent: *Combe & Co.*

(1) The order, ultimately drawn up by the Registrar, was to the following effect:—The Judge Ordinary having read the statement filed on behalf of the petitioner, and heard counsel thereon on behalf of both parties, and referring to the decree *nisi*, made on the 8th of July, 1865, for the dissolution of the marriage of the petitioner and the respondent, whereby the respondent was condemned in costs incurred and to be incurred, and referring also to the order made on the 30th of January, ordered that, notwithstanding the reversal of the decree *nisi*, the petitioner shall be entitled to all her costs comprised in the said decree *nisi*, which were incurred previously to the 16th of January, 1866, together with the costs of and arising from this application, and ordered that on the taxation of the said costs the petitioner's costs of and incidental to the trial and hearing of this cause be allowed against the respondent, although the said costs shall exceed the sum (if any) paid or secured by the respondent to cover such costs.

MOORE AND BARBER *v.* HOLGATE AND WIFE.

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Jan. 30.

Will—Proving in solemn form—Citation of Heir-at-Law—20 & 21 Vict. c. 77, s. 61.

The Court will not allow an heir-at-law, or devisee, to be cited under the 61st section of the 20 & 21 Vict. s. 77, unless all the next of kin have been cited by the party propounding the will, or unless those who have been cited have filed pleas contesting the validity of the will.

Pow. Will-3

THE plaintiffs propounded the will of Barnard Brook, deceased, in a declaration filed on the 25th of January. The testator died possessed of real as well as personal estate, which was affected by the will. The plaintiff's solicitor made an affidavit, stating that a cause was depending in the Court of Probate, wherein the plaintiffs were proceeding to prove the will in solemn form of law.

Dr. Swabey moved for leave to cite the co-heiresses-at-law of the deceased to see proceedings, under the 20 & 21 Vict. c. 77, sec. 61. (1)

[SIR J. P. WILDE. The time for pleading has not yet expired.]

That makes no difference, for "proceedings are taken to prove the will in solemn form," and the right of the plaintiffs to cite the heiresses-at-law cannot depend upon whether the defendants plead or omit to plead.

[SIR J. P. WILDE. But how is the Court to ascertain whether proceedings are being taken to prove in solemn form? The plaintiffs have not cited all the next of kin. If those who have been cited do not choose to plead, the plaintiffs may obtain an order at chambers to discontinue contentious proceedings, and

(1) "Where proceedings are taken under this act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons, having or pretending interest in the real estate affected by the will shall, subject to the provisions of this act and to the rules and orders under this act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court."

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take probate in common form, even after they have cited the heiresses-at-law.]

In that case the section would not apply, and the heiresses-at-law would not be bound by the probate. The plaintiffs are not bound to cite all the next of kin before they can prove in solemn form.

SIR J. P. WILDE. The Court is authorized to cite the heir-at-law in two events only; one being where the validity of a will is actually in contest; the other being where the will, although not in contest, is about to be proved in solemn form by the person who brings it before the Court. The question is, whether the Court can see, on the proceedings as they now stand, that the plaintiffs are about to prove in solemn form. If no pleas are filed, they can, when the time for pleading has elapsed, either go on to prove in solemn form, or discontinue contentious proceedings and take probate in common form. The Court will act upon the rule which is laid down in *Copleston* v. *Nichols* (1)—namely, that as soon as the will is in contest, or as soon as, there being no contest, the party propounding the will shews that he intends to go on and prove in solemn form, it will issue a citation. The motion may stand over until the time for pleading has expired. If no pleas are filed, the plaintiff should cite all the next of kin, and then he will be in a position to say that he really intends to prove in solemn form.

Feb. 20. *Dr. Swabey* renewed the motion. Pleas have been filed contesting the validity of the will.

The Court granted the motion.

Proctors for plaintiffs: *Shephard & Skipwith.*

Attorney for defendants: *Fluker.*

(1) 33 L. J. (P. M. & A.) 57. See also *Domville* v. *Domville*, 34 L. J. (P. M. & A.) 79.

HORRELL *v.* WITTS AND PLUMLEY. *Feb.* 13.

Administration, Pendente Lite—Partnership Business.

Where the estate of a deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the Court will not appoint an administrator *pendente lite* against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business.

This was an application on the part of John Witts, the defendant, for the appointment of a receiver of the real estate, and of an administrator *pendente lite* of the personal estate, of Humphrey Whitaker Flower, the deceased in this cause, who died on the 7th of August, 1865. The plaintiff had married the half-sister of the deceased, and propounded a will, dated the 6th of January, 1862, of which he was executor, which will was opposed by the defendant, who is a nephew of the deceased, and interested under a prior will, of which also the plaintiff was executor. There was no opposition to the appointment of a receiver of the real estate, but there was by the plaintiff to the appointment of an administrator *pendente lite*.

It appeared by the affidavits, that in 1850 the plaintiff and the deceased took a farm in their joint names, called Cocum, the plaintiff providing capital and stock of the value of 1500*l*., and the deceased investing in it 880*l*. From this time up to his death the deceased lived with the plaintiff, and during the latter years of his life, the deceased, being a great invalid, took no part in the management of the farm. It was suggested in one of the affidavits filed by the defendant, that the plaintiff, since the death of the deceased, had been guilty of a *devastavit* by selling 300 ewes. To this the plaintiff replied that, owing to the failure of the turnip crop, this sale was necessary, and that he had managed the farm since the deceased's death in the same manner as he had done in his life.

Dr. Wambey, for the defendant, urged the appointment of an administrator *pendente lite* on the ground of the *devastavit* charged. He also relied on the rule laid down in *Bellew* v. *Bellew* (1) for the

(1) 34 L. J. (P. M. & A.) 125.

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future guidance of the Court, namely, that it would appoint an administrator *pendente lite* wherever the Court of Chancery would appoint a receiver, and that the Court of Chancery appointed a receiver wherever there was a bonâ fide suit pending, quite irrespective of the condition of the estate or of the person who had the actual possession of it, on the ground that while the suit was pending there was no one entitled to receive or hold the assets, or to give discharges.

Dr. Spinks contrà. There is no pretence for saying the plaintiff has been guilty of a *devastavit*. The proposition cited from *Bellew* v. *Bellew* (1) does not apply to the case of a partnership, in which the surviving partner is the proper person to carry on the business. It would be a most unwarrantable interference with the plaintiff for the Court to appoint a third person to supervise and control him in the management of his own farm.

SIR J. P. WILDE. The rule which I laid down in the case of *Bellew* v. *Bellew* (1) is not applicable to all cases. Where there is no one who is legally entitled to represent or to take possession of the deceased's property, and it is requisite to bring actions, or to make demands for the payment of money due to his estate, it is often necessary that an administrator *pendente lite* should be appointed; but where the deceased at the time of his death was in partnership with another person, the case is very different. The deceased and the plaintiff were joint tenants of this property; it belonged to them in partnership, and if an administrator were to be appointed, there would be nothing for him to lay his hands upon until an account of the estate has been taken in Chancery. The only result of making a grant of administration *pendente lite* now would be the appointment of some person to wrangle with the surviving partner as to the management of the farm. When one out of four or five partners in a commercial firm dies, the Court does not thrust a stranger to the business into the partnership, to represent the interests of the deceased partner. The same rule is applicable to a farming business. I do not say that an extreme case might not arise in which the Court would interfere to prevent the destruction of property, which had been held in partnership.

(1) 34 L. J. (P. M. & A.) 125, 11 Jur. N.S. 988

If the parties think they can make out a strong case of that kind, they may renew the application. At present the case is not strong enough to induce the Court to interfere, and I reject the motion.

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Attorney for plaintiff: *J. Mackrell.*

Attorneys for defendant: *Johnson & Weatheralls.*

IN THE GOODS OF GIBSON.

Jan. 30.

Form of Renunciation—Intermeddling—Practice.

The Court received and acted on an informal deed of renunciation, which stated in substance, although not in terms, that the executor had not intermeddled.

ELIZABETH GIBSON died on the 19th of July, 1863, at Sydney, New South Wales, leaving a will and codicil, whereof she appointed W. Sloane and W. H. Lamond, of Victoria, and six other persons, executors. Probate was granted by the Supreme Court of New South Wales to W. H. Lamond, and by the Supreme Court of Victoria to W. H. Lamond and W. Sloane, power being reserved to the other executors to come in and prove. W. H. Lamond and W. Sloane executed a power of attorney authorizing J. W. MacLaren, of London, to take a grant of administration of the estate and effects of the deceased in England, with the will and codicil annexed. One of the other executors was dead, and each of the remaining five executed a deed of renunciation and disclaimer in this form: "Whereas the said (executor) has never accepted or acted in the trusts of the said will and codicil, or any of them, and is desirous to renounce and wholly disclaim the said trusts of the said will and codicil. Now, these presents witness, that the said (executor) doth hereby absolutely and irrevocably renounce and wholly disclaim all the real and personal estates, trusts, powers, and authorities whatsoever, in and by the said in part recited will and codicil of the said testatrix deceased, bequeathed or given, to the intent that such bequests, devises, trusts, powers, and authorities may take effect, and be executed or exercised as if originally made to, or vested in, or confided to, the said W. H. Lamond and

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W. Sloane only." The Registrar declined to make the grant to MacLaren, on the ground that these deeds of renunciation were informal, as they did not state that the executors by whom they were executed had not intermeddled, and they did not in terms renounce the right to a grant. The renouncing executors resided in Australia.

Bayford moved for a grant of administration, with the will and codicil annexed, to MacLaren.

Sir J. P. Wilde. The question is, whether the deeds of renunciation in their present form are sufficient. The Court cannot act upon them unless it is satisfied that their meaning is in substance that the persons who executed them have not intermeddled. I think that is their meaning, and the grant will therefore go as prayed.

Attorney: *Sladen.*

Feb. 13.

In the Goods of SIBTHORP.

Incorporation of Deed in Will—Deed not produced—Probate without Incorporation.

A testator disposed of his residue according to the trusts contained in a certain deed to which he was not a party, and in which he had no interest. The persons interested under those trusts, and who had the custody of the deed, refused to produce it or to allow a copy to be made of any part of it for the purpose of being incorporated in the probate. The Court directed probate of the will to issue without the incorporation of the deed, or of any part thereof.

The Rev. H. W. Sibthorp died on the 4th of November, 1865, leaving a will and two codicils. By the will, dated the 17th of December, 1861, he left his residuary estate to executors and trustees upon trusts to pay certain annuities, and after the death of the survivor of the annuitants to pay and discharge the incumbrances which should then affect the corpus of the estate comprised in or which should then be subject to the trusts of an indenture of settlement, dated the 23rd of March, 1848, made between, &c.; but if no such incumbrances should be then subsist-

ing, and if only part of the trust moneys should be applied for the purposes aforesaid, then in that case he declared that the whole of such trust moneys then constituting his residuary estate should be held by the trustees upon and for the same trusts, intents, and purposes, as if such trusts had arisen under the exercise of the powers of sale and exchange contained in the said indenture of settlement of the 23rd of March, 1848. The testator was not a party to this deed; it did not affect his property, and he had no interest in the property to which it related. The Sun Fire Office held the deed as mortgagees of the estate with which it dealt, and they refused to part with it, or to allow it to be copied or inspected.

Two of the executors were trustees of the deed, and the solicitors for the executors were also solicitors for the trustees. They had in their possession, as solicitors for the trustees, an attested copy of the deed, but they declined to produce it for the purpose of being incorporated in the probate. The District Registrar of Lincoln required the deed or a duly authenticated copy of it to be produced before granting probate.

Jan. 30. *Dr. Wambey* moved that probate might be granted of the will and codicils without the deed or a certified copy of it being incorporated therein. The executors cannot procure the deed or a certified copy of it, and the Court cannot compel the persons in whose custody it is to produce it or allow a copy to be taken. It is contrary to public policy to compel the production of title deeds. He referred to *Sheldon* v. *Sheldon* (1); *In the Goods of the Marquis of Lansdowne* (2); and Tayl. Ev., p. 1182.

Cur. adv. vult.

SIR J. P. WILDE. The question which arose in this case has very frequently arisen in previous cases, and it is not, I am sorry to say, capable of being determined by any exact rule. It is, to what extent is it necessary that the documents referred to in a will should be incorporated in the probate? The testator, in that part of his will which relates to the distribution of his residue, has chosen to refer to a certain deed of settlement

(1) 1 Rob. Ecc. 81. (2) 3 Sw. & Tr. 194; 32 L. J. (P. M. & A.) 121.

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in which he had no concern or interest; and it was strongly urged that it would not be right that the Court should insist on the production by third persons of an instrument belonging to them, and affecting their rights only, before admitting the will to probate. I am prepared to accept that doctrine, and to hold that the Court is not justified in seeking to elucidate a testator's intentions by compelling third persons to produce private deeds which may form part of the title to estates in which the testator had no concern. If the result be that the probate is imperfect, it arises from the necessity of the thing, and the fault lies with the testator, or with those who advised him to make a will in such a form. The Court does at times insist on a document other than the testamentary instrument forming part of the probate, and the reason for its doing so is twofold. First, those interested under the will are interested in having set out in the probate, under the sanction of the Court, any document which is referred to in the will in such a way as to be incorporated with it, and it may be that if that was not done the court of construction might hold that such document was not part of the will. Secondly, it is convenient that the ultimate destination of the residue should be on record in the registry, in order that if the chain of representation should be broken, the Court may have before it the means of ascertaining who is entitled to a grant for the further distribution of the estate. In this case, as regards the first reason, the parties applying for the probate do not wish to have the document set out in it; and as regards the second reason, although no doubt it is desirable that the destination of the residue should if possible appear upon the probate, yet if that can only be done by forcing on people, who do not desire it, the production of an instrument in which third persons only are interested, the Court will not insist upon it. If it can be done otherwise, the Court ought to require it. If an affidavit is made shewing that the persons who have the custody of the deed refuse to allow that portion of it which concerns the distribution of the residue to be copied and inserted in the probate, then the probate must go without it. Very likely it may turn out on examination of the deed that a portion of it sufficient to ascertain the ultimate disposition of the residue may be extracted and incorporated in the probate without hurting

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IN THE GOODS OF SIBTHORP.

those to whom the deed belongs. But it is for them to say what they will do. It is their deed, and the Court will not force them to produce it. I decree probate of the will and codicils subject to the production of the affidavit I have mentioned.

Proctor: *Tatham.*

GUARDHOUSE AND OTHERS *v.* BLACKBURN AND ANOTHER.

Feb. 13.

Probate—Insertion of clause in a codicil by mistake—Practice.

Where a codicil had been read over to a capable testatrix and duly attested by her, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her, and by his inadvertence.

The Court stated the general rules which since the Wills Act ought to govern its action in reference to a duly executed paper.

THE defendants in this case were the executors under the will and codicil of Mrs. Hannah Jameson, late of Netherton, in Cumberland, who died on the 29th of August, 1863. The plaintiffs were the residuary legatees named in her will. The will was dated the 30th of May, 1851, and the codicil the 13th of April, 1852, and both were proved in common form by the defendants, in October, 1863. The probate had since been called in by the plaintiffs, and the will and codicil were propounded by the defendants in the ordinary declaration.

By the will the testatrix disposed of three different estates, called Folds, Scales, and Stainton; the estate of Scales she charged with legacies to the amount of 500*l.*, and that of Stainton with eight legacies of the amount of 100*l.* each. She duly executed a codicil to her will in the following terms:

"This is a codicil to the will of me Hannah Jameson, of, &c., which will bears date the 30th day of May, 1851. I revoke the bequest of 100*l.* therein made to my nephew, Edward Blackburn, and in lieu thereof I give him 200*l.* I give and bequeath the legacy or sum of six hundred pounds, equally, unto, between, and

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amongst the therein named Samuel Jameson, John Jameson, Dorothy Smith, Margaret Armstrong, Jane Jameson, and Mary Ann Jameson; the said Jane Jameson and Mary Ann Jameson taking one-fifth share only, upon the same conditions, and under the same limitations in all respects as I have in my said will devised my estate of Folds in their favour. I release and discharge my said estate from the payment of the legacies therein given to my executors, and I direct all the legacies *therein and* herein given (and not revoked) to be paid out of my personal estate. In all other respects I ratify my said will. In witness whereof, I have hereunto set my hand, this 13th day of April, 1852. Hannah Jameson."

The plaintiffs admitted the due execution of the will and codicil and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate in lieu of; and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of 500*l.*, and of the estate of Stainton of the payment of legacies to the amount of 800*l.*, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased.

William Carrick said in examination: he took the instruc-

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tions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of 1300*l.*; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Dr. Deane, Q.C. (*Dr. Tristram* with him), for the defendants, contended: First, it was not competent to the Court to vary a will by parol evidence. By so doing, the very object of the Wills Act would be defeated, which was to do away with all evidence except that which appeared within the four corners of the will. Secondly, the Court was asked to do what the deceased could not have done for herself in her lifetime. If she had inserted these words *per incuriam*, and had after execution struck her pen through them, they would be restored to probate. Thirdly, there was no case in which a clause had been expunged from probate, unless it had been inserted by fraud. They cited *Langston* v. *Langston* (1); *Hippsley* v. *Horner* (2); *In the Goods of Duane* (3); *Allen* v. *M'Pherson* (4); *Webber* v. *Stanley*. (5)

Dr. Spinks (*Mounsey* with him), for the plaintiffs, submitted there were two questions for the consideration of the Court. First, was parol evidence admissible to correct the mistake? It was laid down in 1 Wms. on Executors, p. 330, 5th ed., that, if a particular clause had been inserted in a will by fraud, without the knowledge of the testator in his lifetime, it ought to be excluded from the probate. There was no distinction in principle, and there ought

(1) 2 Cl. & Fen. 94. (2) 1 Turn. & Russ. 48. (3) 2 Sw. & Tr. 590.
(4) 1 H. of L. 191. (5) 33 L. J. (C. P.) 217.

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to be none in practice, in expunging a clause, whether inserted in a will by fraud or by mistake. The function of a Court of Probate was to ascertain what the testator intended to constitute as his will. A clause inserted in a will by fraud was omitted from probate, not as a punishment upon the party who committed the fraud, but because it defeated the testator's intentions. On the same ground, a clause inserted by mistake ought to be excluded. Parol evidence being admissible to establish the fact of the insertion by fraud, it was equally admissible to establish the fact of the insertion by mistake. Secondly, did the evidence of Carrick satisfy the Court of the mistake? It was submitted it was ample to do so. They cited: *Bayldon* v. *Bayldon* (1); *Barton* v. *Robins* (2); *Blackwood* v. *Damer* (3); *In the Goods of Chapman* (4); *Billinghurst* v. *Vickers.* (5)

Cur. adv. vult.

SIR J. P. WILDE. The plaintiffs have cited the defendants, to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof.

The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will.

The ground upon which the Court is asked to expunge them, is that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proved to be the fact (if the evidence is admissible, and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions.

It is not, however, denied that the codicil, as it stands, was read to the testatrix, and duly executed by her. Questions of vital

(1) 3 Adds. 232. (2) 3 Phill. 455. (3) 3 Phill. 458.
(4) 1 Rob. 1. (5) 1 Phill. 187.

importance to the integrity of the present testamentary system are here raised. It devolves on the Court to endeavour to disentangle the line of demarcation between what the law allows and what it refuses, to the natural desire of giving effect to what are supposed to be the testator's wishes, and to set clear the limits within which any script duly executed can be shorn of its full testamentary effect, by reference to any other source of information. I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the Ecclesiastical Courts on this head. Under that law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the Court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former.

Hence the class of cases in which those courts have gone farthest in violating the integrity of an executed paper. They will be found collected in the argument of Dr. Addams, in the case of *Fawcett* v. *Jones and others* (1), a case remarkable for the evident hesitation and reluctance with which Sir John Nicoll accepted the full results of the principle involved in the previous decisions. His judicial foresight enabled him to turn aside from the brink to which these decisions were urging him; and he refused to pass over a line, which, once passed, would have set all wills at the mercy of parol evidence, and "introduced (as he said) a most alarming insecurity into the testamentary dispositions of all personal property." The most prominent of these cases was *Blackwood* v. *Damer*. (2) It was appealed to the delegates, who affirmed the decision of the court below, and permitted a will which had been duly signed with full knowledge of its contents, and which contained no residuary clause, to be supplemented by instructions in the testator's own writing, giving the residue to his daughter, granting probate of the will, and that part of the instructions as together constituting the will, and this on the ground of mistake, proved by the attorney and corroborated by the written paper of instructions. This case was much relied on in argument

(1) 3 Phill. at p. 450. (2) 3 Phill. 458.

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here. But the words of the Wills Act, "No will shall be valid" unless executed in a certain manner, obviously exclude the probate of unexecuted instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. It is conceded ground in the argument, that this Court cannot any longer admit to probate any paper, whatever its form, which is not executed according to the statute. This class of cases, therefore, is of no authority in reference to wills made since 1838, and, in deciding the present case, may be laid aside. But then comes the question, if the Court cannot now, as it could before the statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the Court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. Nothing is less satisfactory than a perusal of the cases decided in the Prerogative Court under this head. In some cases, parol evidence was excluded, and in some admitted without any sufficient difference in principle to sustain the distinction. I venture to think that the Ecclesiastical Courts created a difficulty (perpetually recurring) for themselves, when they attempted to adopt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the Court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts, and pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the

inquiry without some proof beyond the mere writing. In the attempt to escape these rules, while keeping up the semblance of adhering to them, Sir John Nicoll, in the case above quoted, speaks of "an ambiguity in the factum" of the instrument, and makes that the ground of admitting parol evidence. But what, it may be asked, are all controversies as to the instrument, which should be pronounced to contain the testamentary intentions of the deceased, and to be his will, but cases in which some ambiguity exists as to the factum of such instrument as a complete will? The truth is, that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect. Nor indeed are these rules pressed in the courts either of law or equity beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see *Pym* v. *Campbell*. (1) Or if (going further still) some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see the case of *Wake* v. *Harrop* (2), and the paragraph there cited from Story's Equity Jurisprudence, at page 772. On this head, then, the Court may safely adopt the language of Mr. Justice Williams on Executors (3): "In a court of construction, when the factum of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited, for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

I may quit this branch of the subject with the observation that the foregoing remarks have a wider application to wills made before the statute than since, for the statute has much narrowed the field of inquiry; the principle, however, is the same. It is

(1) 6 E. & B. 370. (2) 6 H. & N. 768. (3) Vol. i. p. 313, 5th ed.

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hardly necessary to add, that where the Court of Probate has (as is often the case) to construe one admitted testamentary paper, for the purpose of ascertaining another, it acts as a court of construction, and is guided by the same rules. Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs to what extent is it still open to the Court since the statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? A more important inquiry could hardly arise. For you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration, the following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper:—First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. The first and second of these propositions are amply established by the case of *Barry* v. *Butlin* (1), and others of that class in the Privy

(1) 2 Moo. P. C. 480.

Council. The third was also well approved law in the Ecclesiastical Courts, for there must be an "animus testandi" to constitute a paper testamentary. The fourth requires no comment, and the last is justified by the case of *Allen* v. *McPherson*. (1) It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the Court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the statute would thus perish at the hands of the Court. I have thus endeavoured to place the use of parol evidence in these matters on its true ground. The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade—more certain, more reliable—than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If a statute require that a thing should be in writing and signed, in order to its validity, it precludes the Court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be added as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testator before the execution thereof, she duly executed the same, and the Court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for

(1) 1 H. of L. Cas. 191.

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the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.

Attorneys for plaintiffs: *Gray & Mounsey.*
Attorneys for defendants: *Allen, Nicol, & Allen.*

Feb. 20.

RENNIE *v.* MASSIE AND OTHERS.

Costs of improperly propounding a will—Nude executor.

The fact that a person who has improperly propounded a testamentary paper is a nude executor is no ground for relieving him from his liability to condemnation in costs.

P. 1867

THE plaintiff propounded the will, and one codicil thereto, of Jonathan Downes, late of Stretton Hall, Cheshire. The defendants, who were legatees under the will, pleaded several pleas in opposition to the codicil, and the issues were tried before Sir J. P. Wilde, by a special jury, on the 14th, 15th, and 16th February, 1866. The jury found that the deceased was not of sound mind at the time when he executed the codicil, and that he did not know and approve of its contents; and the Court thereupon pronounced for the will and against the codicil.

The plaintiff was appointed executor both in the will and in the codicil. He took no interest under either of them, and it appeared that he had no personal knowledge of any of the circumstances attending their preparation and execution. The widow of the deceased was the only person interested under the codicil.

The Queen's Advocate (*Hawkins, Q.C., Dr. Wambey*, and *J. H. Simpson* with him), for the defendants, prayed that the plaintiff might be condemned in costs.

Dr. Spinks (*Edward James, Q.C.*, and *Dr. Deane, Q.C.*, with him), contrà. The plaintiff has no interest whatever in the suit, but being appointed executor in a codicil which appeared to be well executed, he was bound to bring it before the Court.

The Queen's Advocate. It was his duty before propounding the codicil to make inquiries, and to satisfy himself that it ought to

be propounded. He might have cited the widow to propound, instead of propounding it at his own peril. 1866

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Cur. adv. vult.

SIR J. P. WILDE. I thought there was no reasonable ground for the litigation in this case, but it was suggested that the plaintiff ought not to be condemned in costs because he was a nude executor. I think that is no ground for relieving him from his liability as to costs. An executor is not bound to propound a testamentary paper if he does not like to do so, and in a case of doubt it would not be unreasonable that he should take the precaution of obtaining security for costs from the persons interested in upholding it. If the plaintiff has not taken that precaution, it is his own fault. If the Court were to refuse to condemn a person in costs on the ground that he is an executor, great injustice would follow, for any one who wished improperly to set up a testamentary paper would be able to do it under the shield of an executor without the risk of costs.

Proctor for plaintiff: *E. W. Crosse.*
Attorney for defendants: *H. D. Bird.*

IN THE GOODS OF RHOADES. *Feb.* 27.

Administration—Will of Bastard—Grant to the Crown save and except—Right of legatees to grant with will annexed—Practice.

Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant save and except, or to a *cæterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will.

MARY RHOADES died on the 15th of February, 1865, a spinster and a bastard, leaving a will of the 19th of September, 1845, whereof she appointed two executors. One of the executors died in the lifetime of the testatrix, and the other died on the 2nd of April, 1865, without having proved the will. Her Majesty, by warrant under her Royal sign manual, dated the 20th of January

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1866, and countersigned by two of the Commissioners of the Treasury, directed H. R. Reynolds, the solicitor for the affairs of the Treasury, to apply for, and obtain, letters of administration, with the will annexed, of the personal estate and effects of the deceased for Her Majesty's use.

The will purported to be made in the exercise of a power of appointment therein recited, and disposed of three equal fourth parts of a sum of 2000*l.* in favour of the brothers and sisters of the testatrix and their children. It did not name any residuary legatee.

Feb. 6. *The Queen's Advocate* moved for administration to H. R. Reynolds accordingly.

[SIR J. P. WILDE. Are not the appointees under the will entitled to administer that part of the estate in which they are beneficially interested?]

I am instructed that it is the practice to make a general grant to the grantee of the Crown in such cases.

[SIR J. P. WILDE. The Crown is no doubt entitled to a *cæterorum* grant, or to a grant save and except, but the appointees should have notice of the application for a general grant.]

Feb. 27. *The Queen's Advocate* renewed the motion. The appointees have had notice of the application and have not appeared.

SIR J. P. WILDE. The Crown has no interest whatever in that portion of the property upon which the will operates. I have inquired, and I find it is not the practice to give a general grant to the next of kin, where there is no disposition of the residue. It seems to me clear that the Crown ought not to take a grant in which it has no interest. There should be two grants, one to the Crown and another to the appointees, limited to that part of the estate to which each of them is entitled. Before you can take a general grant you must obtain the consent of the appointees. If they do not consent the grant must be save and except.

Order that an instrument of consent, under the hands and seals of the appointees named in the will, be filed, and thereupon with such consent that the letters of administration with the

will annexed be granted to H. R. Reynolds for the use of Her Majesty.

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March 31 (in the Principal Registry). The Queen's Proctor alleged that the appointees declined to consent, and one of the registrars of the Principal Registry thereupon ordered letters of administration of the personal estate and effects of the deceased to issue to H. R. Reynolds, "save and except such personal estate and effects as the said deceased, in virtue of a power to appoint and dispose of by will, had in and by her said will or testamentary appointment, appointed and disposed of accordingly."

Proctor: *The Queen's Proctor.*

TODD *v.* TODD.

Jan. 20.

Wife's suit for Dissolution of Marriage—Collusion—20 & 21 Vict. c. 85, s. 30—Dismissal of Petition—Wife's Costs.

On the hearing of a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with desertion, it was shewn that the adultery charged and proved, was committed by the husband in fulfilment of a promise previously made by him to the wife that he would give her an opportunity of obtaining a divorce; that the adultery had been committed in order that it might be proved; that evidence of it had been obtained by means of information supplied to the wife by the husband; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him:—

Held, that the husband and wife were guilty of collusion within s. 30 of 20 & 21 Vict. c. 85.

The husband was ordered to pay the costs of the wife, although her petition for dissolution was dismissed on the ground that they had been guilty of collusion.

THIS was a petition by Josephine Marianne Todd, for a dissolution of her marriage with Joseph Edward Todd, on the ground of adultery coupled with desertion. The respondent filed an answer traversing those charges, and the case was heard by the Judge Ordinary without a jury.

Dr. Spinks and *Pearce*, for the petitioner; *Dr. Tristram*, for the respondent.

Dr Spinks, in opening the case, said that some of the circum-

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stances were calculated to excite the suspicion of the Court; but he believed that when they were fully investigated, it would be found that there had been no collusion, although the respondent was no doubt willing that the petitioner should obtain a divorce.

It was proved that the petitioner was the daughter of Mr. and Mrs. Black, who resided in Regent Square, London; that she married the respondent, contrary to her father's wish, on the 27th of October, 1861, in London, and that, in December, 1861, they went to Calcutta, and then proceeded to Upper Assam, where they cohabited at some tea plantations, of which the respondent was the part owner; that the climate did not agree with the petitioner; and that in the middle of 1862 she returned to England for the benefit of her health, with the understanding that she was to return to her husband as soon as her health was restored, or that he would rejoin her in England; that she arrived in England in August, 1862; that immediately after her departure he wrote to her and to her father, stating that he had never loved her, and that they were now separated for ever; that he made her an allowance of 120*l.* a year, which was continued during the rest of the separation; that after staying for some time with her parents, she went to France and Germany in order to qualify herself as a teacher of languages; that she several times wrote to him, and informed him that her health was restored, and in March, 1864, she wrote a last letter, imploring him to allow her to return to him, and at least to let her have the protection of his name and home, even if they lived as strangers to each other, but she received no answer; that in May, 1865, she was at Cologne, and was informed that the respondent was expected in England, and she then returned to her father's house, in order to be ready to receive him in case he should visit her, but he did not visit her, and that she never saw him, except once in the street, when they did not speak. The adultery was charged to have been committed at the Hotel du Var, Rue de la Chausée d'Antin, in Paris, in the month of August, 1865.

The witnesses called in support of the petition were the petitioner, her father and mother, Mr. Mardon (her solicitor), his son, and Simpson, a detective, who had been employed to watch the respondent. It appeared from their evidence that in the two letters

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which Mr. Todd wrote to Mrs. Todd and to her father immediately after the separation, he promised that as soon as he was richer he would "let her be honestly divorced;" that after Mr. Todd's arrival in England in 1865, Mrs. Todd's father instructed his solicitor, Mr. Mardon, to take steps to obtain a divorce, and shewed him Mr. Todd's letters; that Mr. Mardon thereupon had an interview with Mr. Reeves, who had acted as Mr. Todd's solicitor in other matters, and informed him that he wished to find out whether Mr. Todd had been guilty of adultery; and that Mr. Reeves, after some negotiation, communicated to Mr. Mardon, on the 29th July, 1865, three addresses, one in London, another in Paris, and a third at Spa, at which Mr. Todd was to be found. It further appeared that previous to the 29th July Mr. Mardon had set a watch on Mr. Todd in Paris, at an address which he obtained from Mrs. Todd and her mother, who had obtained it from Mr. Todd's sister, and that this watching had led to no result; that Mr. Mardon then sent his son to the address at Spa, which had been given to him by Mr. Reeves; that young Mr. Mardon, under an assumed name, introduced himself to Mr. Todd at Spa, and became very intimate with him; that after remaining at Spa for eight or nine days they went together to Paris, and that there Mr. Todd committed the adultery charged in the petition, of which young Mr. Mardon gave evidence. Three letters were produced, written by Mr. Todd to Mrs. Todd; one in the beginning of August, 1865, immediately before young Mr. Mardon went to Spa, in which he said he had "performed his promise," and asked whether he could move away without being watched; the second and third after the adultery relied upon had been committed, in which he said "he had done all that was required."

THE JUDGE ORDINARY. I feel constrained to come to the conclusion that this is not a case in which the Court can give relief, because the parties have been acting together in collusion. [His Lordship then referred to those parts of the evidence which proved the facts above stated, and said:] From this testimony I have come to the following conclusions of fact:—that, when Mr. Todd came to Europe, although personally he kept free from all communication with his wife, he did, through the agency of his sister,

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manage to communicate to her that he was going to Paris; that, having promised to give her an opportunity of getting a divorce when he got rich, he went to Paris, informing her of the address to which he was going, for the express purpose of fulfilling the promise; and that, in giving her that address, he intended that she should obtain evidence of the act of adultery he was about to commit. I conclude also that she was consenting to this state of things. And I think, in short, that she and her husband were acting in concert together, that the arrangement between them was, that he was to commit adultery in order that she might obtain a divorce, and that he was to give her the address where he was going to commit adultery, in order that she might obtain evidence of it. She failed to obtain the necessary evidence on the first occasion, although he may probably have committed adultery, for he says in one of his letters that he has done all that is required. Having come to that conclusion as to the previous transactions, in what light am I to regard the subsequent transactions at Spa and at Paris? The conclusion I have arrived at is, that his second visit to Paris was made for the express purpose of committing adultery, and of being detected. And whether anything passed openly between him and young Mr. Mardon to shew that the latter was at Spa for the purpose of watching him or not, I am satisfied that Mr. Todd, in taking this stranger to live with him in the way that has been described, knew that he was the person who was to give the necessary evidence, and entered into that close communication with him for the purpose of enabling him to give that evidence.

[His Lordship referred to the 30th section of the Divorce Act of 1857 (20 & 21 Vict. c. 85), and to the case of *Lloyd* v. *Lloyd & Chichester* (1), and then said:] It is extremely difficult to define collusion, or to describe it by any periphrasis, nor do I propose to do so. But it seems to me that where, as in this case, the husband has promised the wife to commit adultery in order that she may obtain a divorce, and she has consented, as I find that she has done, to take the course indicated to her by the husband, namely, that of watching him in order to obtain evidence of his adultery, and where the adultery

(1) 1 Sw. & Tr. 567; 30 L. J. (P. M. & A.) 97.

charged has been committed with that understanding between the parties, and the evidence has been obtained by that means, it is impossible to say that the parties have not been colluding together and playing into one another's hands in presenting the petition and prosecuting the suit. Having come to that conclusion it is my duty to dismiss the petition, and I do so accordingly.

Dr. Spinks applied for an order, under Rule 159, that the wife might be allowed her costs. If the judgment is right the husband is equally to blame, and she is entitled to her costs as against him.

THE JUDGE ORDINARY. I think the husband intended that the costs of the proceedings should fall on him. Feeling that he had done his wife a grievous wrong, and wishing to repair it, he was probably prompted, to some extent, by a good motive, in the course he has taken, and partly, perhaps, by a wish to marry again. No doubt he intended to pay the costs; there is no reason, as between him and the petitioner, why he should not pay them.

Petition dismissed accordingly, and the wife's costs ordered to be paid by the husband.

Attorneys for petitioner: *Mardon & Walker.*
Attorneys for respondent: *Davies & Co.*

DENT *v.* DENT. *Feb.* 27.

Suit for dissolution—Decree of judicial separation—Examination of wife—Costs.

A wife who petitioned for a dissolution of marriage on the ground of adultery coupled with cruelty, and gave evidence in support of the charge of cruelty, prayed at the hearing for a decree of judicial separation instead of dissolution, and that decree was pronounced on the grounds of adultery and cruelty. As she was not a competent witness in a suit for judicial separation founded on adultery, the Court ordered her costs of attending personally to give evidence to be disallowed.

THIS was originally a suit by a wife for dissolution of marriage on the ground of adultery coupled with cruelty. The respondent denied those charges, and pleaded condonation. The issues were tried before the Judge Ordinary by a common jury, on the 14th

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July, 1865. Evidence was given in support of both the charges in the petition, the petitioner being one of the witnesses as to the cruelty. The jury found that the respondent had been guilty of adultery and cruelty, that the adultery had been condoned, and the respondent had been guilty of cruelty subsequent to such condonation. Before the decree nisi was pronounced, the petitioner's counsel prayed that she might have a judicial separation instead of a dissolution of her marriage, and the Court thereupon pronounced a judicial separation on the grounds of adultery and cruelty. (1) The costs of the petitioner had since been taxed against the respondent, and the costs of the witnesses, including the petitioner herself, in support of both the charges, had been allowed.

G. Browne, for the respondent, moved that the taxation might be reviewed. The suit must now be treated as one for judicial separation on the ground of cruelty, and the costs of the witnesses of adultery ought therefore to be disallowed. It cannot be treated as a suit for judicial separation on the ground of adultery, because the petitioner was not a competent witness in such a suit, and her evidence was received.

Pritchard, for the petitioner. The wife may not be entitled to her own costs of attending to give evidence, but she is clearly entitled to the costs of all the other witnesses.

THE JUDGE ORDINARY. The proper time for drawing the attention of the Court to the question now raised, and for making an application for a special order as to costs, was when the petitioner prayed for leave to substitute a prayer for judicial separation for the prayer for dissolution of marriage. The Court should then have been asked to state whether the decree was pronounced on the ground of adultery or of cruelty, and if it was founded on one of those grounds only, to disallow the costs of giving evidence as to the other. There is some inconsistency in the order as it now stands. As the decree was founded on adultery as well as cruelty, it is clear that no costs caused by the wife having been called as a witness ought to be allowed, for she is not a competent witness in

(1) 34 L. J. (P. M. & A.) 118.

the suit. She cannot be allowed to recover a larger amount of costs than she would have recovered, if the suit had been originally instituted in the form which it ultimately took at her desire. If she had taken the decree on the ground of cruelty alone, she would not be allowed the costs of proving the adulterv. I shall direct the registrar to disallow any costs which may have been incurred by the wife being called as a witness.

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Attorneys for petitioner: *Pritchard & Sons.*
Attorneys for respondent: *Lucas & Meredith.*

T. *v.* D. FALSELY CALLED D.

Feb. 27.

Nullity of Marriage—Impotence—Want of Corroborative Evidence—Delay—Wife's Costs—Rule 159.

In a suit by a woman for nullity on the ground of the man's impotence, the petitioner's evidence that the marriage had never been consummated was neither corroborated nor contradicted, the medical evidence being consistent both with consummation and non-consummation. It appeared that cohabitation had continued for eight years without complaint on the part of the petitioner, and that the separation was caused by the respondent's ill-treatment of her. The Court found that the charge was not sufficiently proved, and dismissed the petition.

The wife's costs of the hearing of a suit of nullity instituted by her on the ground of the husband's impotence were ordered to be paid by the husband to the extent of the sum for which he had deposited security in the Registry, although the petition was dismissed.

THIS was a suit by a woman for nullity of marriage, on the ground of the man's impotence. The respondent, in his answer, traversed the allegations in the petition, and charged the petitioner with adultery; but that charge was struck out by order of the Court. The cause was heard *in camerâ* on the 17th and 27th of January, and was undefended, the respondent not being represented by counsel. The marriage took place on the 17th of October, 1854, and the date of the final separation was about February, 1863. The petitioner, at the time of the marriage, was thirty years of age, and a spinster; and the respondent was about thirty-five. The medical inspectors certified, as to the petitioner, that "the usual sign of virginity, the presence of a hymen, is absent, and we do not find anything that would be an impedi-

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ment to the due performance of sexual intercourse:" and as to the respondent, that in their opinion he was quite capable of performing the act of generation.

The petitioner and some medical men who had attended her were examined in support of the petition. The petitioner stated that the marriage had never been consummated. The evidence of the medical witnesses neither corroborated her nor contradicted her on that point.

Dr. Spinks, for the petitioner. The evidence of the petitioner that the marriage has never been consummated is uncontradicted, and is not inconsistent with the medical evidence. If there has been no consummation, the presumption is that it is the fault of the man. There is no suspicion of collusion, and on the evidence the petitioner is entitled to a decree.

Cur. adv. vult.

THE JUDGE ORDINARY. This is a suit for nullity of marriage, in which the wife undertakes proof of the husband's impotence. The husband has appeared and answered, denying his impotence, asserting the consummation of the marriage, and alleging adultery against the wife. He did not appear at the hearing, and the evidence in the case is that produced by the wife alone. The medical inspectors appointed by the Court have certified the husband to be the subject of no apparent impediment. Several medical men were called by the wife, but their evidence does not materially advance the case, for in the result it appears that the physical appearances are, to say the least, consistent with the consummation of the marriage. The marriage ceremony was in October, 1854. The parties lived together until 1862, a period of about eight years; the exact date of the separation was not made clear. Somewhere about the end of 1862, or beginning of 1863, the respondent, who, the petitioner said, had for a long time treated her with great cruelty, shut the doors of his house against her. During the last two years she had slept in a different room, on account of his cruelty; and at last, she says, he tried to strangle her. She took him before the magistrates, and he was bound over to keep the peace. When she got back, she found he had locked

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up the bedclothes and bed, and she was obliged to leave, which she had been previously advised to do, on account of his ill treatment. After this, in February, 1864, the petition was filed in this cause. During the cohabitation she made no complaint to any one of that grievance from which she now seeks relief. She alleges that she was not aware of her remedy; but she admits that she was made aware of it by a Mr. Benson a few weeks before she left home. In such circumstances as these, the evidence ought at least to be cogent, which should justify the Court in pronouncing a decree: see *H*—— v. *C*——. (1)

Eight years' cohabitation without complaint, and at the end of it a separation enforced by the husband, justify a vigilant suspicion as to the sincerity of the suit. The strong motive that exists on both sides to break a tie that had become burthensome to both, makes it difficult to obtain a true account from either. The husband stands by. It is said he is hostile; but he is hostile to his wife, not to the suit, and the wife's personal account is the sole testimony which the Court has for its guidance. It derives no support from any single circumstance in the case, nor from the physical appearances to which the medical witnesses speak. The result is that the charge made by the wife and denied by the husband is not made out to the satisfaction of the Court, and the petition must be dismissed.

Dr. Spinks asked for an order, under the 159th rule, for the wife's costs of the hearing to the extent of the security deposited in the Registry by the husband. The husband did not choose to come forward and deny the charges against him.

THE JUDGE ORDINARY made the order.

Attorney for petitioner: *J. J. Rae.*
Attorneys for respondents: *Richards & Walter.*

(1) 1 Sw. & Tr. 616; 29 L. J. (P. M. & A.) 81; 6 Jur. N.S. 349 affd. by House of Lords N.S.
(2) See 1 W.R. 36

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March 20.

HYDE *v.* HYDE AND WOODMANSEE.

Mormon Marriage—Polygamy.

Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.

A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

THIS was a petition by a husband for a dissolution of marriage on the ground of adultery. There was no appearance by the respondent or the co-respondent. The cause was heard by the Judge Ordinary on the 20th of January, 1866.

The following facts were proved. The petitioner was an Englishman by birth, and in 1847, when he was about sixteen years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in the territory of Utah, in the United States; and in 1853 the petitioner, who had in the meantime been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April, 1853, and it was celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children. In 1856, the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December, 1856, and his wife was declared free to marry again. In 1857 a correspondence passed between the petitioner and his wife,

who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon church without danger to his life. In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860, the respondent contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, and she has since cohabited with him as his wife, and has had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah. The petitioner and the respondent were both single, and the petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in Utah, if valid in Utah, would be recognised as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage. The Supreme Court, however, had no appellate jurisdiction over the courts of other States in matrimonial matters; and the matrimonial court of each State had exclusive jurisdiction within its own limits. Utah was a territory not within any State. There was a matrimonial court, having primary jurisdiction, in that territory, and the judge was nominated by the President of the United States, with the consent of the Senate. The judge was bound to recognise the laws which the people of Utah made for themselves, as long as they did not conflict with the laws of the United States. No evidence was given as to the law of that court respecting Mormon marriages.

Dr. Spinks, for the petitioner. The Court cannot perhaps recognise a polygamous marriage, but this is not a polygamous marriage, for both the parties were single at the time when it was contracted.

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The fact that polygamy is permitted by the law of the country where the marriage was contracted does not render it invalid, or there can be no such thing as a valid marriage in polygamous countries. A marriage between two persons competent to contract marriage, and valid by the law of the place where it was contracted, is valid in every country in the world.

[THE JUDGE ORDINARY. It is necessary to define what is meant by "marriage." In Christendom it means the union of two people who promise to go through life alone with one another. It does not mean the same thing in Utah, as the man is at liberty to marry as many women as he pleases.]

That is not the question. It does not follow that because the consequences of a marriage in Utah and in England are different, the marriage in Utah is not to be recognised as valid in England. The validity of the marriage must be determined by the law of the place where it was contracted; the consequences of the marriage depend upon the law of the country where the parties reside, whether temporarily or permanently, after the marriage.

[THE JUDGE ORDINARY. It would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage in this country. Different incidents of minor importance attach to the contract of marriage in different countries in Christendom, but in all countries in Christendom the parties to that contract agree to cohabit with each other alone. It is inconsistent with marriage as understood in Christendom, that the husband should have more than one wife.]

Cur. adv. vult.

THE JUDGE ORDINARY. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the lex loci, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil—to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are

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slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender* v. *Warrender* (1), is very appropriate to these considerations:—"If, indeed, there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is whether or not the thing called marriage—that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with—has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the

(1) 2 Cl. & F. 531.

affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the lex loci, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are

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not applicable to such a union as the present, is there any other to which the Court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this Court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife would be incapable of this remedy, and this Court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the applica-

tion of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this Court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the Court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee* v. *Perozeboye* (1), in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the Ecclesiastical Courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the Court proceeded:—"We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it

(1) 10 Moo. P. C. 375, 419.

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must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with these views the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Petition dismissed.

Attorney for petitioner: *W. Shaw.*

March 13.

IN THE GOODS OF LAMBERT.

Declaration on oath in lieu of affidavit—Administratrix resident abroad—Practice.

A declaration on oath received instead of an affidavit, the person making it being resident abroad, where an affidavit could not be made.

THIS was a motion for a grant of administration upon presumption of death to the widow of the deceased, who resided at Bischwiller, near Strasbourg, in France.

SIR J. P. WILDE. Is there an affidavit that the applicant is the lawful widow and relict of the deceased, and that he died intestate?

Dr. Spinks. She cannot make an affidavit in the English form, because she is resident in France, but she has made a declaration

on oath before a notary, in the form prescribed by the law of France. (1) 1866

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SIR J. P. WILDE. I think that is sufficient.

Motion granted.

Attorneys: *T. Young & Son.*

REFFELL *v.* REFFELL. *April* 25.

Mistake in date of Will—Parol evidence as to date of execution—Revocation.

Parol evidence is admissible to prove that a will was executed on a date other than that which appears upon the face of it.

Two wills were propounded, one bearing date on the 27th of February, 1855, and the other on the 11th of December, 1858. There was no ambiguity on the face of either of them, and each of them contained a general clause of revocation. Parol evidence was admitted to prove that the will bearing date on the 27th of February, 1855, was in fact executed on the 27th of February, 1865, and on that evidence the Court pronounced for the will of 1865, and against the will of 1858.

The plaintiff, Henry Reffell, propounded as executor a will, bearing date the 11th of December, 1858, of Elizabeth Reffell,

(1) A duly certified translation of this document was filed with the original. It was in the following form:

"Attestation of the 27th of January, 1866. Before Mr. Edward Stromeyer, and his colleague, notaries at Strasbourg, undersigned, has appeared Dame Caroline Dorothée Lambert, residing and domiciled at Bischwiller, near Strasbourg, in the Empire of France, declaring herself the lawful widow, and not remarried, of Mr. Eugene Lambert, who has stated that she takes oath, and that she declares: 1, that she was at the time of the decease of the said Eugene Lambert, the lawful wife of the latter, of Greenock, in Scotland, &c., and that he was a German by birth, and that he was domiciled in the Empire of France. . . . . 3, and finally, that she declares that the said E. Lambert, deceased, has died intestate, and that he has never executed any deed as regards the disposition of his effects, or of any part of his effects. Given in order to serve as attestation and to avail in the Probate Court of Her Britannic Majesty, Principal Registry. In the Goods of Eugene Lambert, deceased. Whereof an Act done and passed at Strasbourg, at the office of Mr. Stromeyer, undersigned, in the year 1866, on the 27th of January, after reading over, effected with interpretation in German, the dame, the appearer, has signed with the notaries.

Caroline Dorothée Lambert.

Louth. Stromeyer.

"Seen by us, President of the Tribunal of First Instance of the Department of Strasbourg for the legalization of the signatures of Messrs. Stromeyer and Louth, notaries in this city. (L.S.)

Strasbourg, the 29th January, 1866."

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widow, who died on the 15th of September, 1865. The defendant, William Joseph Reffell, alleged that the testatrix, on the 27th of February, 1865, made her last will and testament, bearing date the 27th of February, 1855, written in the said will by mistake for 1865, and thereby revoked the will in the declaration mentioned. The plaintiff replied that the will bearing date on the 11th of December, 1858, was not revoked by the will bearing date on the 27th of February, 1855, and that the will bearing date on the 27th of February, 1855, was not duly executed on the 27th of February, 1865.

The cause was heard before Sir J. P. Wilde, without a jury, on the 21st and the 25th of April. The only question raised was whether the Court was at liberty to receive and to act upon parol evidence, shewing that the date 1855 had been inserted by mistake in the will propounded by the defendant. Both wills contained clauses of revocation, and the date of the will propounded by the defendant was written at full length above the attestation clause and the signature. There was nothing in the contents inconsistent with its execution either in 1855 or in 1865. A witness named John Higgins who had prepared it from the testatrix's instructions, was produced on behalf of the defendant, and deposed that after he had drawn it up he read it over to the testatrix, and she declared her assent to it; that he then inserted the date, and wrote "fifty-five" instead of "sixty-five" by mistake, and that the testatrix then executed it (on the 27th of February, 1865), and that he did not discover the mistake until it was produced after the testatrix's death.

Dr. Spinks, for the plaintiff. Parol evidence is not admissible for the purpose of revoking a will. If the will dated in 1855 is admitted to probate on this evidence, the will of 1858 will be revoked by parol. If there is anything in a will shewing that it cannot have been executed on the day it bears date, *e.g.*, if it gives a legacy to a person who was not born until after the date, evidence is admissible in order to explain the ambiguity, but there is nothing in this will to raise a doubt as to the date of its execution, and the evidence is tendered for the purpose of contradicting the date which appears on the face of it. He cited *Guardhouse* v. *Black-*

burn (1); *Walpole* v. *Cholmondeley* (2); *In the Goods of Chapman.* (3)

Dr. Wambey, for the defendant. Parol evidence is not admissible to explain or to vary the terms of a written instrument, but there is no authority for the proposition that it is not admissible to shew that such an instrument was executed on some day other than that on which it bears date. The date is not part of the will, and a will is good without a date. If the Court is satisfied that the will was executed in 1865, the date appearing on it is of no importance. He cited 2 Tayl. Ev., 917; 931 (5th ed.); *Hall* v. *Cazenove* (4); Rosc. N.P. 675: *Jayne* v. *Hughes* (5); *Randfield* v. *Randfield.* (6)

Dr. Spinks, in reply. In all the cases cited in which parol evidence was received, there was extrinsic evidence shewing an ambiguity in the document which it was necessary to explain.

SIR J. P. WILDE. I am inclined to think that the rule as to the exclusion of parol evidence, upon which so much reliance has been placed, has no application to this case. I intended in *Guardhouse* v. *Blackburn* (1) to point out that there is a distinction between an inquiry into the meaning of a written document,—will, contract, or deed,—and an inquiry into the existence of such a document. In this case the Court has two wills executed by the testatrix before it, one dated in 1858 and the other in 1855. The function of the Court is to ascertain which of these is her last will and testament; and there is no doubt that the last will and testament, whichever of them it is, revokes the one that preceded it. The Court is therefore bound to decide whether the will dated in 1858 revoked the will dated in 1855, or whether the will dated in 1855 revoked the will dated in 1858. It would be a strong thing to hold that the will, which was executed in 1858, revoked a will which, beyond doubt, was not in existence (if the fact may be inquired into) until 1865. And the principle would go further still. For if a will were by mistake dated the 1st of April, though actually executed on the 2nd, and the Court were conclusively bound by the false date, it would seem to follow that the Court

(1) *Ante.* 109; 12 Jur. N.S. 278
(2) 7 T. R. 138.
(3) 1 Rob. Ecc. 1.
(4) 4 East. 476.
(5) 10 Ex. 430; 24 L. J. (Ex.) 115.
(6) 6 Jur. N.S. 901; 8 H.L.C. 225.

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could not properly receive any evidence of execution of the will at all.

But supposing the general rule as to the exclusion of parol evidence to apply to cases of this kind, Dr. Wambey has cited abundant authority to shew that it has no application to the date of the instrument. The cases cited include instruments of almost every class, and there is the statement of a careful text writer (Tayl. Ev.) to the same effect. In *Hall* v. *Cazenove* (1), evidence was admitted to shew that a charter-party was wrongly dated; and in *Jayne* v. *Hughes* (2), evidence was admitted to shew that a deed (a more solemn instrument if possible even than a will) was wrongly dated. Then comes the case in the House of Lords (3), where parol evidence was admitted apparently without a question being raised, shewing that a will purporting on the face of it to be executed before the passing of the Wills Act was actually executed after the act came into operation. The two cases cited on the other side belong to another class. They are both cases in which the Court had to construe the document before it. There was no question as to the factum of the document or as to the time when it was executed; but the question was as to the meaning of the language used in the document; and to such questions the doctrine of latent and patent ambiguities has always been held to apply. *In the Goods of Chapman* (4), the learned judge thought no ambiguity existed. The testator identified a will by the date, and the Court felt bound to take the date as the true description of the will.

On these grounds I am of opinion that the last will actually executed is the will of the deceased, and I accordingly pronounce for the will propounded by the defendant. As the litigation arose from the blunder of the testatrix, the costs of both parties will be allowed out of the estate.

Proctors for plaintiff: *Rothery & Co.*

Attorney for defendant: *Lovett.*

(1) 4 East. 476.

(2) 10 Ex. 430; 24 L. J. (Ex.) 115.

(3) *Randfield* v. *Randfield*, 6 Jur. N.S. 901; 8 H.L.C. 225

(4) 1 Rob. Ecc. 1.

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May 1.

Wills Act, s. 9—*Attestation—Testator—Signature not seen by attesting witnesses.*

If a testator signs his will in the presence of the attesting witnesses who see him in the act of writing, and they then attest, the attestation is good, although they do not see the signature, and he does not acknowledge it.

The attesting witnesses to a will saw the testatrix writing something on the will before they signed, but they did not see what she wrote, and they did not know that it was a will. When they subscribed their names they did not see the attestation clause, which contained the testatrix's signature, or any of the writing on the will, as the testatrix concealed it from them by holding a piece of blotting-paper over it. There was a full attestation clause in the testatrix's handwriting:—

Held, that as the witnesses had seen the testatrix write what the Court presumed to be her signature, although they did not see the signature, and she did not acknowledge it to them, the attestation was sufficient.

THIS was a cause of proving in solemn form the will of Maria Smith, spinster, late of 9, Osnaburgh Street, Regent's Park, deceased. It was propounded by the executors, and the defendant who was the brother and one of the next of kin of the deceased, pleaded that it was not duly executed.

The will was holograph, and was written upon three pages of a folded sheet of paper, the conclusion and the attestation clause being at the top of the third page, as follows:—

"Witness my hand, this fourth day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Signed and acknowledged by me, the said Maria Smith, the testatrix, as and for her last will and testament, in the presence of us, present at the same time, who in her presence, at her request, and in presence of each other, have hereunto subscribed our names as witnesses.

Eli Pearson,
47, Munster Square.

Sarah Newman,
9, Osnaburgh Street."

A part of the letter "h," in "Smith," passed a little beyond the line drawn between the attestation clause and the signatures of the witnesses.

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Eli Pearson, one of the attesting witnesses, gave the following evidence:—"In November last I was at work in Miss Smith's drawing-room. She came to me and said: 'Have you any objection to put your name to a paper with the cook?' She did not say what sort of a paper it was. I said: 'Certainly not.' I followed her down stairs into the front dining-room. She went to a table and wrote for a few minutes. I did not see what she was writing. She then said: 'Call the cook, Sarah.' I went out and called the cook, and she came, and we both went into the drawing-room; Miss Smith then wrote again for a short time; I did not see what she was writing. Then she said: 'Now, will you sign, please?' I said: 'Shall I sign first?' She said: 'It will be as well.' I then went to the table, and she gave me a pen. There was a piece of blotting-paper, which covered all the writing on the paper. I said: 'My hand is dirty;' and I was going to take up the blotting-paper. She said: 'Never mind;' and put her finger on the blotting-paper, and kept it there until the cook and I had signed. I signed where she told me, and then the cook signed. The cook and I then left the room. I could not see any part of the attestation clause when I signed, but I may have seen a little of the writing at the top. I believe the line to the left of my signature was there, but I am not certain."

Sarah Newman gave evidence to the same effect. She said she saw Miss Smith write something, but did not see what she wrote, and did not see any of the writing to the left of the line, and she could not say whether the line was there.

Manisty, Q.C., and *Dr. Spinks*, for the plaintiff. The signature in the attestation clause is sufficient. (1) The only question is whether it was duly attested. The presumption is in favour of due execution, and the Court will presume that what the testatrix wrote after the two attesting witnesses were in the room was the signature in the attestation clause.

Dr. Deane, Q.C., and *Searle*, for the defendant. The presumption omnia rite esse acta arises only in the absence of evidence. In this case there is positive evidence that the witnesses did not know what paper they were to sign, and did not see the signature,

(1) *In the Goods of Walker*, 2 Sw. & Tr. 354; 31 L. J. (P. M. & A.) 62.

—they subscribed, but they did not attest. Subscription is a manual act—attestation is a mental act; and witnesses cannot attest a signature which they do not see, and the existence of which they do not know.

[Sir J. P. WILDE. They were present, and saw something written, although they do not know what it was. There is a full attestation clause in the handwriting of the testatrix, containing her signature. The question is, whether it was signed in the presence of the two witnesses. Is not that sufficient evidence that it was?]

Ilott v. *Genge* (1), *Hudson* v. *Parker* (2), are authorities that it is not.

[SIR J. P. WILDE. Would it have been sufficient if she had told the witnesses that it was her will?]

It would not. *In the Goods of Trinder.* (3) There being no acknowledgment, and the evidence proving that the testatrix carefully concealed the signature from the witnesses, the attestation was insufficient.

Manisty, Q.C. We do not contend that there was an acknowledgment, but the fact that the attestation clause was written by the testatrix, shews that she knew what was necessary to constitute a valid execution, and the presumption that she did what was necessary by signing in the presence of the two witnesses, is not rebutted by the evidence: *Gwillim* v. *Gwillim* (4); *Lloyd* v. *Roberts.* (5)

SIR J. P. WILDE. The presumption omnia rite esse acta is strong in a case like the present, and the Court ought to be very careful not to defeat the intention of the testatrix by setting aside the will, unless the evidence clearly rebuts that presumption. It is proved that the testatrix intended to execute some paper, and to have it attested by witnesses, and that she wrote out a holograph will with a full attestation clause at the end of it, part of which was probably written in the presence of one of the witnesses, and there was nothing in the evidence tending to shew that she copied it from anything before her. Whether she copied it or not, it is a full attestation clause, and it clearly points out what

(1) 3 Curt 160; affirmed on appeal, 4 Moo. P. C. 265.
(2) 1 Rob. Ecc. 14.
(3) 3 Notes of Cases, 275
(4) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.
(5) 12 Moo. P.C. 158.

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ought to be done in order to make a good execution. It is clear, therefore, that she was about to execute the paper, and that she knew what was requisite for that purpose. Having taken one of the witnesses into a room downstairs, she sends for the other, and when they are both in the room, in their presence she sits down and writes again. What did she then write? It seems to me, looking at the position in which the signature, Maria Smith, is placed in the middle of the attestation clause, and passing beyond the line drawn down the side of the clause, that it was probably written after the rest of the clause had been written, and that she forbore to complete the clause while the witnesses were out of the room, but waited to write the signature until they were present. The conclusion of fact which I draw is, that what she then wrote was her name. The next question is, what did the witnesses see and attest? They both saw her write that which I am now satisfied was her name, but they did not see the name, and did not know that it was her name. The question is, whether that is a sufficient attestation? If the Court were to hold that it is not, it would invalidate a great many wills, because it must often happen that when a testator calls witnesses into a room to attest his will, they stand at some distance from him, perhaps at the opposite side of a large table, and see his pen going but do not see what he is writing, and that they then write their names without seeing his signature in consequence of a piece of blotting-paper being placed over it, or of their not being asked to look at it, and nothing occurring to direct their attention to it. I am, therefore, unwilling to hold that it is not sufficient for the attesting witnesses to have seen the fact of writing, which I am satisfied was the signature, take place, unless they also saw what that writing was; nor does the statute, in my opinion, require such a decision. For the signature was "made in the presence of" the two witnesses; they saw the act of writing, and they were, I consider, aware that they had been called in for the express purpose that it should be made in their presence. I therefore hold that there was a good execution, and pronounce for the will. The costs of both parties will be paid out of the estate.

Proctor for plaintiffs: *E. W. Crosse.*

Attorney for defendant: *G. F. Smith.*

HAWKSLEY AND HUGHES *v.* BARROW. *May* 8.

*Will of married woman—Will made under a power—Revocation by will made during second coverture—*1 *Vict. c.* 26, *s.* 20.

A will made by a woman, previous to her second coverture, under a power contained in a settlement executed in contemplation of her first marriage, or during her first coverture, may be revoked by another will or codicil, or by some writing declaring an intention to revoke, and executed like a will, or by destruction with the intention of revoking, during her second or any subsequent coverture, although no power of revocation was reserved by the settlement, and no settlement was made on the second or subsequent marriage.

THE plaintiffs in their declaration alleged that Jane Barrow, of Walmer, in the county of Kent, the wife of Samuel Horship Barrow, but divorced a mensa et thoro from him by a decree of the Consistory Court of London, who died at Walmer on the 29th of May, 1865, by virtue and in exercise of certain powers and authorities given and vested in her under certain settlements, made her last will and testament, bearing date on the 25th of August, 1864, and therein appointed the said plaintiffs executors. The declaration then propounded the will in the usual form. The defendant, S. H. Barrow, pleaded that the paper writing, bearing date the 25th of August, 1864, propounded as the last will and testament of Jane Barrow, is not and does not by itself contain her last will and testament, for that the said Jane Barrow, then Jane Coombes, widow, under and by virtue of certain powers and authorities vested in her under certain settlements, made her last will and testament bearing date the 11th of June, 1850, and a codicil thereto of even date therewith, and in the said will appointed J. S., since deceased, and the defendant, executors. The plea went on to propound this will and codicil in the usual form, and concluded with the allegation that the three paper writings, bearing date respectively the 11th of June, 1850, and the 25th of August, 1864, are and do together contain the last will and testament of the said deceased. The plaintiffs replied: 1. That the testamentary papers of Jane Coombes, widow, afterwards Jane Barrow, bearing date on the 11th of June, 1850, were revoked by the subsequent marriage of the said Jane Coombes to S. H.

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Barrow, the defendant, on the 30th of July, 1850. 2. That the said testamentary papers were respectively revoked by the will of the 25th of August, 1864.

The cause came on for hearing before Sir J. P. Wilde, without a jury, on the 19th of April. The material facts were as follow: By an ante-nuptial settlement, dated the 27th February, 1839, a sum of 5000*l.*, 3 per cent. consols, was settled upon the deceased, then Jane Dell, for her sole and separate use and benefit, without power of anticipation, during the joint lives of her and of her then intended husband, George Coombes; and in the event of her surviving G. Coombes, upon her for the remainder of her life; and upon the death of the survivor, upon such children of the marriage as she should by deed or will appoint, and in default of appointment, upon all the children; and in default of issue, "in trust for such person or persons, and for such purposes and in such manner as the said Jane Dell in and by her last will and testament in writing, or any codicil thereto, or any testamentary writing, shall at any time or times after the solemnization of the said intended marriage, and notwithstanding her said intended coverture, and whether covert or sole, direct or appoint, and in default of, and subject and without prejudice to, any such direction or appointment, and so far as any such direction or appointment shall not extend, then in trust for . . . F. P. Stubbs, his executors, administrators, and assigns absolutely." In February, 1839, after the execution of this settlement, the deceased married G. Coombes. By a deed of the 3rd of August, 1839, a further sum of 5000*l.*, 3 per cent. consols, was settled upon the same trusts as those contained in the settlement of the 27th of February, 1839. G. Coombes died on the 19th of April, 1847, and there was no issue of the marriage. On the 11th of June, 1850, the deceased executed the will and codicil propounded by the defendant, wherein she exercised the power of appointment given to her by the two settlements of 1839, in favour of the defendant. On the 29th of July, 1850, an ante-nuptial settlement was executed in contemplation of the marriage between the deceased and the defendant, which did not contain any reference to the two sums included in the settlements of 1839, but settled all other property belonging to the deceased for her separate use, with power of appointment.

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On the 30th July, 1850, the deceased and the defendant were married, and on the 14th of July, 1852, the Consistory Court of London, at the suit of the deceased, pronounced a decree of divorce a mensa et thoro. The will of the 28th of August, 1864, the due execution of which was proved by one of the attesting witnesses, purported to be made in the exercise of the powers contained in all the marriage settlements above referred to; it contained a clause expressly revoking all former wills and testamentary appointments; and it made appointments of the property included in all the settlements in favour of persons other than the defendant.

Karslake, Q.C., and *Dr. Spinks*, for the plaintiff. The will of 1850 being within the exception in the 18th section of the Wills Act (1), was not revoked by the subsequent marriage of the testatrix, but it was revoked by the will of 1864, which is a valid exercise of the powers of appointment contained in the three marriage settlements.

W. Forster, for the defendant. The settlement made on the first marriage cannot invade the marital rights of the second husband. A married woman cannot make a will unless the power of doing so is reserved to her by settlement. The power reserved to her by the settlement made on the first marriage was not intended to extend, and does not extend, to a second coverture. The settlement made on the second marriage does not reserve any rights vested in her by the settlement on the first marriage. The will of 1850 not being revoked by the subsequent marriage, as in default of appointment, the settled property goes to a stranger (2), the question is, whether she had power to revoke it after the marriage, no such power having been reserved to her by the settlement. It is submitted that during her second coverture her power of dealing with the property comprised in the first settlement was suspended, and that she was intestable as to that property.

[SIR J. P. WILDE. Suppose there had been two children of the first marriage, A. and B., and she had appointed in favour of A., and then G. Coombes died, and she married the defendant, could she not have revoked the appointment to A., and appointed to B.?]

She could not during the second coverture. The words of the

(1) 1 Vict. c. 26.

(2) 1 Vict. c. 26, s. 18; *Vaughan* v. *Vanderstegen*, 2 Drew. 165.

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first settlement do not apply to a second coverture: *Sockett* v. *Ray* (1), *Knight* v. *Knight* (2), *Bradley* v. *Hughes*. (3)

[SIR J. P. WILDE. You say that the marital rights of the second husband would be invaded by holding that the will made during the second coverture revokes the appointment made previous to the coverture: but suppose she had made no such appointment, what would be the rights of the husband as to the property comprised in the first settlement? The law does not give him a power to appoint under that settlement, and he derives no benefit from it, and has no means of turning it to account.]

His marital right is the right to incapacitate his wife from making a will. It may or may not be a beneficial right, but she cannot invade it unless she contracts that the power of doing so shall be reserved to her.

[SIR J. P. WILDE. Your proposition is, that when a woman who has a power of appointment marries, unless by settlement she reserves to herself the right of exercising that power, it is suspended during coverture, although it does not pass to her husband, so that she loses the power, but no one else gets it. Is there any authority for that proposition?]

I am not aware of any case on the point, but cases continually occur in practice where a woman by marrying loses her right to exercise a power. The question arose in *Vaughan* v. *Vanderstegen*. (4) If this Court should grant probate of the second will alone, the Court of Chancery will limit its operation to the property comprised in the marriage settlement of 1850.

Karslake, *Q.C.*, and *Dr. Spinks*. Contrà. A woman who is the donee of a power of appointment, has a right to exercise that power at any time and during any number of subsequent covertures. 1 Sugden on Powers, ch. 5, s. 1; 1 Chance on Powers, par. 526 (p. 200, ed. of 1831); Bright's Husband and Wife, Bk. 3, c. 1, p. 204; *Horseman* v. *Abbey*. (5) In *Barrow* v. *Barrow* (6), where several wills made during coverture by the deceased were before the Court, it was not suggested by the Lords Justices that they were not a valid execution of the powers contained in the first settlement. The words of that

(1) 4 Bro. C. C. 483.
(2) 6 Sim. 121.
(3) 8 Sim. 149.
(4) 2 Drew. 165.
(5) 1 Jac. & W. 381.
(6) 5 D. M. & G. 782.

settlement are wide enough to include all subsequent covertures. This is not a question of the invasion of marital rights, for the defendant appears not in the character of husband but in the character of legatee under the will of 1850. The argument on the other side is, that if the will made before marriage had been in favour of a stranger, the deceased could not have made a will after marriage in favour of her husband. A will cannot be irrevocable, and if the will of 1850 could have been revoked by tearing or burning, it may be revoked by another will. The Court of Chancery will have to decide whether the appointment made by the last will, in the exercise of the power under the first settlement, is good, but that is a question in which the representative of the settlors are interested and not the defendant, for even if it is not a valid appointment, it is a valid revocation of the previous will in his favour. The principle on which a married woman is incapacitated from making a will is that her property has become the property of her husband, and on her death he takes it, but that principle has no application to property in which he has no interest.

[SIR J. P. WILDE. I will consider whether any other will than the will of 1864 ought to be included in the probate, and if necessary I will allow evidence to be produced of the due execution of the will of 1850, and of any other will which the deceased may have executed.]

Cur. adv. vult.

SIR J. P. WILDE. In this case probate is sought of a testamentary paper duly executed on the 25th day of August, 1864, by Jane Barrow. Jane Barrow was a feme covert at the time of the execution of this paper; but it is conceded that, under the powers given to her by Mr. Barrow in the settlement made on her marriage, she was competent to make a will. It is not, therefore, denied that the script of the 25th August, 1864, ought to be admitted to probate. But it is contended that a previous will executed by her when sole, on the 11th June, 1850, ought to be included in the probate as part of her last will and testament. To this it is replied that the paper of the 11th June, 1850, was revoked by that of the 25th August, 1864, and so no doubt it was in express terms, "I do revoke all former wills and testamentary appointments by

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me at any time made," &c. To this it is answered that, being a feme covert in August, 1864, she had no power to revoke a former will made when sole. And the argument was, that to permit a married woman to revoke a previous will would be to allow her to invade the rights of her husband. On inquiry by the Court what the rights of the husband were which would be invaded, the answer made was, "the right to incapacitate his wife from making a will."

If such an abstract right exists, independent of the interest in his wife's property which a husband acquires by marriage, it would seem to be rather a wanton legal creation; but it would still remain to be shewn that the want of power to make a will involved a disability to cancel, destroy, or revoke one already made. It is enough, therefore, for the decision of this case, to say that no principle, authority, or dictum of a legal tribunal was offered to the Court for the proposition that a married woman is legally incapacitated from the revocation of a testamentary instrument in any of the modes pointed out by section 20 of the Wills Act. And as one of those modes is by another will, "or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed," it is not even necessary in this case (so far as revocation is concerned) that the paper of the 25th of August, 1864, should have been a will at all. For it is duly executed as a will should be, and it does in terms revoke all former wills and appointments. The paper of the 11th of June, 1850, must therefore be held to have been revoked, and cannot be included in the probate.

Another question, however, remains—namely, whether the testatrix had or had not during her second coverture, the legal right to exercise the power of appointment which had been reserved to her by the settlement made on her first marriage. In the circumstances of the present case, that is a question with which it does not belong to this Court to deal. If there had been no words of revocation in the will of 1864, and the appointment of 1850 had only been revoked by the fresh appointment contained in that will, it might have devolved on this Court to ascertain and determine, (for the purposes of revocation), whether the testatrix could lawfully make such appointment by will during her second coverture. Or, pushing the principle contained in the case of

Barnes v. *Vincent* (1), a little further, it might have deemed it right to grant probate of both papers, so that the court of equity might meet no impediment in dealing with the exercise of the power. But, however or wherever this question is determined, it will have, I conceive, to be decided by the terms and extent of the power, and not by reference to any supposed rights of the second husband. Such rights can only extend to property in respect of which he has some actual or contingent interest. And the fact that a woman is married does not prevent her from directing the devolution of other people's property at their desire, without his consent.

Dr. Spinks. The defendant should be condemned in costs. He appeared as the legatee under a revoked will, not as the husband of the deceased.

SIR J. P. WILDE. I condemn the defendant in costs.

Attorney for plaintiffs: *H. H. Meadows.*
Attorney for defendant: *W. M. Kearns.*

HITCHINS *v.* HITCHINS.

March 7.

Evidence—Deposition of Foreign Witness—Requisition to Foreign Court—Mode of Examination.

A requisition with interrogatories and cross-interrogatories annexed to it, issued to a French Court to examine a witness resident in France. The judge of the French Court having the interrogatories and cross-interrogatories before him, examined the witness by putting to him such questions as he deemed convenient, and no questions were put or suggested by the counsel and agents of the parties who were present at the examination. The Court doubted whether the deposition so taken and returned under the requisition by the French Court was admissible in evidence, but declined to reject it.

THIS was a petition by a husband for a dissolution of marriage on the ground of his wife's adultery. The respondent pleaded a denial of the charge, and made counter-charges against the petitioner. The issues came on for trial before the Judge Ordinary by a special jury.

The Queen's Advocate (*Dr. Tristram* with him), for the petitioner,

1) 5 Moo. P. C. 201.

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tendered the deposition of M. Biencourt, a witness examined before the Civil Tribunal of First Instance at Boulogne, under a requisition from this Court. (1)

(1) The requisition was directed to the judges of the Civil Tribunal of First Instance of Boulogne sur Mer, in the empire of France, or to such of them as they might appoint, and it requested that within thirty days, at a certain time and place to be by them appointed, they would summon or otherwise cause J. H. Biencourt, and other witnesses produced on behalf of the petitioner, to come before them, and would administer an oath to them respectively, truly to answer such questions as should be put to them respectively touching the matters set forth in the petition, of which a copy was annexed; that after such oath had been administered they would take the examination of the said witnesses respectively touching the said matters, and would permit such witnesses to be examined and cross-examined by counsel or attorney on behalf of both parties; that they would reduce the said examination and cross-examination into writing, or cause it to be reduced into writing, and for the purpose aforesaid would assume to themselves some notary public or other lawful scribe for their actuary, if they thought it meet and convenient to do so; that they would, if expedient, employ an interpreter; that the said examination and cross-examination having been reduced into writing as aforesaid, they would forthwith transmit them closely sealed up to the registry in Doctors' Commons, London, together with the requisition; and that they would do all such acts, matters, and things as might be necessary and lawful for the due execution of the requisition. Interrogatories, and cross-interrogatories, were annexed to the requisition. It was sent to the French minister of justice, who transmitted it to the tribunal, and it was accepted by MM. Caron de Fromental and Morand the president, and one of the judges of the tribunal. M. Quinion, substitute for the Procureur Impérial, was present at the examination. The heading of the deposition was as follows:—"In the matter of Hitchins of London. Extracts from the minutes of the clerk of the Court of Civil Tribunal of the district of Boulogne sur Mer. The Court of the First Instance of the district of Boulogne sur Mer, sitting in the great hall at the town hall, situate at the Haute Ville of Boulogne sur Mer, the judges sitting being MM. the Lord President Caron de Fromental and Morand, in the presence of M. Quinion, substitute for the Procureur Impérial, assisted by Auguste Boulet, clerk of the Court, duly sworn. The said Court of Divorce having, by letters of request, charged the Civil Tribunal of Boulogne sur Mer to receive the depositions of M. Biencourt and of any other witness who might be brought forward by Mr. Amelius Hitchins (the petitioner), and to put to them all questions which might be deemed convenient, the Court of the First Instance has received as follows the depositions of the witness hereinafter named, who, after having produced the copy of the subpœna served upon him, and been sworn to tell the truth, and declared that he was not a relation, nor in the employment, nor a servant of either party, deposed, without reading from any written document, as follows:"—The deposition was signed by the witness and by the president and the clerk of the Court.

M. Hatherley, a solicitor residing at Boulogne, proved that M. Biencourt had refused to come to England to give evidence. He further stated that he was present at the examination of the witness; that both the petitioner and the respondent were represented by counsel and attorneys; and that questions were put to the witness by one of the judges, and an officer of the court took a note of the evidence. The interrogatories and cross-interrogatories were filed and were before the judge, but he did not put them verbatim. It was the practice for the judge to put any questions suggested by counsel after he had examined the witness, but no question was suggested by the counsel on either side.

Parry, Serjt. (*Dr. Wambey* with him), for the respondent. The deposition cannot be read, for the interrogatories and cross-interrogatories were not put as required by the requisition; there was no cross-examination. He cited Tayl. Ev. s. 477, (p. 441, 5th ed.): *Lumley* v. *Gye.* (1)

THE JUDGE ORDINARY. If the deposition is tendered I shall certainly not exclude it. It appears from the return to the requisition that all the questions which were deemed proper were put by the Court. If the agent of the respondent had asked to cross-examine the witness, and the Court had refused to allow a cross-examination, it is very doubtful whether the deposition could have been read in an English court, but seeing that no request was made to be allowed to cross-examine, and that the cross-interrogatories as well as the interrogatories-in-chief were in the mind of the judge who conducted the examination, I shall not reject the evidence, although I am by no means sure that it ought to be received.

The deposition was accordingly read. At the close of the petitioner's case, the Judge Ordinary held that there was no evidence of adultery to go to the jury, and the verdict was entered for the respondent.

Attorneys for petitioner: *Walker & Martineau.*

Attorney for respondent: *Albert Neate.*

(1) 3 E. & B. 114; 23 L. J. (Q.B.) 112.

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Jan. 20.

IN THE GOODS OF ELIZABETH A. RICHARDS, DECEASED.

Administration—Feme covert an executrix—Residuary legatee—Will of feme covert under a power—Limited probate—Cæterorum grant—Chain of representation—Grant de bonis non.

4 PD 80
PD 153

A. died leaving a will, in which he named B. his wife his sole executrix and residuary legatee. She proved the will, and afterwards married, and having during her second coverture made a will under a power, appointing C., her daughter by her first husband, her sole executrix and residuary legatee, died, leaving her second husband and C. her surviving. Upon her death, C. took limited probate of her will, and afterwards on the renunciation and with the consent of B.'s second husband, who had assigned to her all his interest in the residue of his wife's estate, administration of the rest of her personal estate:—

Held, that C., as administratrix of the rest of the personal estate of B., was entitled to administration of the unadministered personal effects of A.

JOHN SHATTOCK died, leaving a will, of which he appointed his wife, Elizabeth Archer Shattock, sole executrix and residuary legatee. Mrs. Shattock proved the will in the Consistory Court of Exeter, on the 26th October, 1826, and subsequently married Richard Richards, and died on the 15th February, 1855, at Dartmouth, leaving Richard Richards surviving. By the settlement made on her second marriage, and dated August 9th, 1828, the deceased had power, during her coverture with the said Richard Richards, to appoint by will to certain real estate, and to a sum of 1500*l.* then secured on mortgage, and by her will dated June 19th, 1846, she "gave and devised to her daughter, Mary Anne Shattock, all her estate and effects, both real and personal, of what nature and kind soever, that was to say, all her plate, linen, money, &c., in her house at the time of her decease, and all the moneys that might be due to her, and all the rent that might be due to her from W. Liffiton, and she appointed her said daughter, sole executrix of this her will."

On the 11th of May, 1855, probate of the said will limited to the effects over which the deceased had a disposing power, was granted by the Consistory Court of Exeter, to the said Mary Anne Shattock; and on the 13th of November, 1865, letters of administration of the rest of the personal estate and effects of the said Elizabeth Archer Richards, were also granted to her at the prin-

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cipal registry of the Court of Probate, the said grant reciting—that Richard Richards, the lawful husband of the said deceased, had, by an indenture dated June 8th, 1865, assigned unto her, the said Mary Anne Shattock, all the estate and effects of the said deceased, over which she had no disposing power, and had renounced letters of administration to the effects of the deceased, and had consented to the same being granted to Mary Anne Shattock.

Jan. 16. *Dr. Spinks* moved for a supplemental grant to Mary Anne Shattock of administration, limited to such personal estate and effects as vested in Mrs. Richards, as sole executrix of John Shattock. He cited *In the Goods of Rachel Bayne.* (1) But as Mrs. Richards was residuary legatee, under John Shattock's will, this case was precisely similar to the one *In the Goods of George Martin.* (2)

SIR J. P. WILDE. In this case the circumstances are somewhat peculiar. It is an application by Miss Mary Anne Shattock, for a grant of administration, which it is quite clear ought to be made in some form, so as to cover the property to be administered, and the question for consideration is, in what form the grant ought to go. It appears that Elizabeth Archer Richards died in 1855, having made a will in which she appointed her daughter, Mary Anne Shattock, sole executrix and residuary legatee. On the 11th of May, 1855, probate of that will, limited to the effects over which she had a disposing power (she being a married woman), was granted by the Consistory Court of Exeter, to Miss Shattock. On the 13th of November, 1865, Miss Shattock came to the registry for a cæterorum grant of the estate of Mrs. Richards, and obtained it. In this way, practically, she has obtained a grant extending over all the property of the deceased. Her mother, however, Mrs. Richards, was sole executrix and residuary legatee under the will of her first husband, John Shattock, which was proved by her in 1826, and the applicant now wants to represent the estate of John Shattock. The result is, that John Shattock having died leaving a will, and his wife as his sole executrix having taken probate of that

(1) 1 Sw. & Tr. 132. (2) 3 Sw. & Tr. 1; 32 L. J. (P. M. & A.) 5.

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will, and having since died, leaving a will of which she appointed her daughter, Miss Shattock, sole executrix, who has taken probate of her mother's will, the chain of executors seems to be complete. The difficulty is in making a grant to the unadministered estate of John Shattock, while the chain of representation remains unbroken. The practice of this court has always been to maintain the chain of executors as long as it can. I have read the case cited, *In the Goods of Martin* (1), very attentively. It is impossible to distinguish it from the present case. In deference to the decision of my learned predecessor, I feel bound to make a similar grant in this case, observing, that I do not intend to derogate in any way from the practice, that I have already pointed out as well established in the Ecclesiastical Courts. The order will be that the application for a supplemental grant of probate of the last will of Mrs. Richards, limited to such of her personal estate as vested in her as sole executrix of the will of John Shattock be rejected, but that she may obtain letters of administration with the will annexed of the unadministered personal estate of John Shattock, to be granted to her as administratrix of the rest of the effects of Mrs. Richards the sole executrix and residuary legatee named in his will.

Attorneys : *Langley & Gibbon.*

May 15.

PAGLAR AND WIFE *v.* TONGUE.

Will of married woman—Power—Will executed before creation of power—Bonâ fide question as to existence of power—Limited grant with will annexed.

When the Court is satisfied that a bonâ fide question as to the existence of a power enabling a married woman to make a will is intended to or may be raised, it will grant a limited probate of such will, to enable the question as to the existence of the power to be determined by the Court of Chancery.

Where A., being covert in 1844, and having at that time no power to make a will, executed a will, disposing of all property to which she was or ever might become entitled, and certain powers to make a will were given to her by the wills of two persons who died subsequently to the execution of the will of 1844, and by a deed of separation executed in 1850, and an application for administration

(1) 3 Sw. & Tr. 1 ; 32 L. J. (P. M. & A.) 5.

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with the will of 1844 annexed was opposed on the ground that the will, being invalid at the date of its execution, could not be made valid by the subsequent acts of third parties :—

Held, that this was a question to be determined by the Court of Chancery, and that a limited grant might go as prayed.

THE plaintiff, Mrs. Paglar, was a residuary legatee, named in the will of Mary Ann Tongue, a married woman, dated the 27th day of April, 1844, and propounded the same as made under certain powers and authorities thereunto enabling her, and, in pursuance of an order of the judge, had delivered particulars of the instruments, on some or one of which the plaintiffs relied as enabling her to make the will, namely, the will of Rebecca Barnsley (who died in 1845), dated 6th of July, 1829, and two codicils thereto, dated the 31st of August, 1842; a deed of separation between the deceased and her husband dated the 2nd of October, 1850; and the will and codicil of Letitia Tongue, dated respectively the 8th of March and the 27th of May, 1862.

The pleas by the defendant Cornelius Tongue (the deceased's husband) were: 1st. That the will propounded was not a valid will by reason of the deceased being at the time of its execution a feme covert, and there being no power or authority whatsoever existing at the time of her death authorizing or enabling her (notwithstanding her coverture) to make the said alleged will. 2nd. Undue execution.

Issue joined by plaintiffs.

The case was heard before the Court without a jury; no question was raised as to the execution of the will, and the instruments referred to in the particulars were put in evidence by consent. The deceased died on the 31st of August, 1865, having lived separate from her husband for upwards of 30 years. By the will of Mrs. Barnsley, the deceased took a life interest in certain real and personal property for her separate use, with power to appoint the same amongst her children, and in default of issue (which event had not happened) she had a general power of appointment over the same. By the deed of separation, after reciting that the deceased had lived separate from the defendant for many years, and that he had not contributed to her maintenance for 20 years, the defendant agreed "that the household

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furniture, plate, linen, &c., bequeathed for her separate use by the will of Mrs. Barnsley, should remain in her custody and possession so long as the executors of Mrs. Barnsley should permit, pursuant to the trusts and directions of the said will; and also that all other estate and effects whatsoever, real or personal, to which the deceased should, or might, by purchase, gift, or devise, or bequest, or by representation, or by savings out of her separate income or estate, or by any other means, during her present coverture, hereafter become entitled, should be for her sole and separate use, and that she should be at liberty from time to time, notwithstanding her coverture, by her will or codicil to dispose of the same." The bequest to the plaintiff in the will propounded, was as follows: "I give to my two daughters all the property of which I am now possessed, or which I ever may become entitled to at any time whatever."

Dr. Spinks, for the plaintiff. First, the circumstances of the deceased having from a period prior to the date of her will, and up to her death, lived separate from her husband with his assent, and of her having during such period maintained herself and her children without any aid from him, brings the case within *Haddon* v. *Fladgate* (1), so as to entitle her to dispose by will of any property acquired by her during the separation. Secondly, the deed of separation expressly empowers her to make a will.

[*Per Curiam.* Only of property acquired after its date.]

Thirdly, the fact that the instruments creating the power came into operation after the execution of the will, does not make the will inoperative in respect of property given to, or powers conferred on, the deceased by such instruments. The will of the deceased must be taken to speak from the date of her death, in July, 1865, according to the 24th section of 1 Vict. c. 26. See *Stillman* v. *Weedon* (2), *Thomas* v. *Jones*. (3)

Dr. Tristram, for the defendant. There is a material difference between this case and *Haddon* v. *Fladgate*. (1) In *Haddon* v. *Fladgate* the agreement of the husband to permit his wife to enjoy her earnings and property for her separate use was made *before* the date of the will; in the present case it was made six years *after*

(1) 1 Sw. & Tr. 48. (2) 16 Sim. 26.
(3) 31 L. J. (Ch). 732.

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the date of the will propounded, and is expressly limited to after-acquired property. Secondly, at the time of the execution of this will, the deceased being a married woman, had clearly no power to make it, and if her death had occurred before that of Mrs. Barnsley, probate of it would have been refused as a matter of course. A will void at the time of execution, cannot be made valid by the subsequent act of a third party. Thirdly, this will would have been invalid if made before the last Wills Act—*Stone* v. *Forsyth* (1)—and therefore comes within s. 8 of 1 Vict. c. 26, which provides "that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act."

[*Per Curiam.* Is not the question whether the power has been duly executed, one that ought to be left for the decision of the Court of Chancery? Is it not for that Court to say, according to the decision of *Barnes* v. *Vincent* (2), whether a will executed in 1844 is or is not to be construed as the execution of a power, which did not exist until some time afterwards?]

It is a rule of the Court never to grant probate unless the deceased has left some property within its jurisdiction upon which that probate will operate. At the date of this will the deceased had no power to make a will, and had no property settled to her separate use, and if it is clear that the will is void, the grant should be refused on the ground that there is no property in respect of which it can operate. There are expressions used in *Barnes* v. *Vincent* (2) at variance with the previous decision of *Tatnall* v. *Hankey* (3), and so Sir H. Jenner thought, *Este* v. *Este* (4), indicating that wherever a party propounds the will of a feme covert, provided he alleges it to be made in exercise of a power, and without reference to the truth or falsehood of the allegation, the Court is bound to grant probate of it. If this is so, it is at the option of any person to obtain probate of a married woman's will.

[*Per Curiam.* The Court is entitled to expect the party bringing forward the will of a married woman to make out a primâ facie case that it is made in exercise of a power. The Court before granting probate ought to be satisfied that the party is

(1) 2 Dougl. 707.
(2) 5 Moo. (P.C.) 201.
(3) 2 Moo. (P.C.) 342.
(4) 2 Roberts. 351.

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making a bonâ fide claim—that the will may or will turn out to be the execution of a power.]

Stillman v. *Weedon* (1) is not in point, as the will there was not the will of a feme covert, but of a person sui juris, and was orginally valid. (2)

SIR J. P. WILDE. The principle upon which the Court must act in this case is laid down in the judgment in *Barnes* v. *Vincent* (3); and the principle I take to be this, that inasmuch as the Court of Chancery, whose exclusive function it is to determine whether a power has been duly executed, cannot look at the paper now propounded, unless the seal of this court is attached to it, this Court ought not to enter upon an investigation as to whether the power has or has not been duly executed (although the deceased's power to make a will at all often depends upon the determination of this question), but it ought to grant probate of the paper, provided it is satisfied that it was duly executed as a will, and provided, in reference to the deceased's capacity as a feme covert to make a will, it is satisfied that a bonâ fide question is intended to or may be raised as to the existence of a power of which the will may turn out to be a good execution. On this principle there is abundant reason to grant probate of the will now before the Court. The deed of separation carries the case farther, because it contains a distinct agreement by the husband that the wife may make a will disposing of after-acquired property, and it appears that she did afterwards come into property, under the will of Mrs. Tongue, who died in August, 1864, and which was proved on the 21st of June, 1865. There is no doubt, therefore, without investigating what other property she could deal with, that she was entitled, after August, 1864, to dispose of the property she took under that will, and no question would have arisen as to her right to make a will in execution of the power, if she had made it after Mrs. Tongue's death. If I were to refuse probate, I should take on myself to determine a matter which ought to be determined by the Court of Chancery, namely, whether or not, there being a power created in a testamentary instrument executed in 1842 by a testatrix who

(1) 16 Sim. 26. (2) And see *Price* v. *Parker*, 16 Sim. 198.
(3) 5 Moo. (P.C.) 201.

died in 1845, and another power created in a will executed in 1862 by a testatrix who died in 1864, a will made in 1844 was or was not an execution of those powers. I do not propose to determine whether the will of 1844 was or was not a due execution of these powers. I am satisfied of the due execution of the will, and therefore grant administration with the will annexed to the plaintiff Mrs. Paglar.

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Attorneys for plaintiffs: *Clarke, Woodcock, & Rylan.*
Attorneys for defendants: *Mackeson & Goldring.*

CONRADI *v.* CONRADI AND FLASHMAN.

March 6.

Costs—Countercharge of adultery—Rule 159*—Practice.*

Where the petitioner established adultery against the co-respondent, but the co-respondent established a countercharge of adultery against the petitioner, and the petition was dismissed; the Court held that the co-respondent was liable for the costs of proving the wife's adultery, and that the petitioner was liable for costs incurred by the co-respondent in establishing the countercharge of adultery.

The 159th Rule directing that the wife's costs of the hearing, when the decision of the Court or jury is against her, shall not be allowed against the husband unless applied for and ordered to be allowed at the time of hearing, is not imperative on the Court, but the Court may dispense with it, and entertain an application for the wife's costs subsequently to the hearing in a meritorious case.

On the 16th of October, 1865, the petitioner instituted this suit for the dissolution of his marriage. The respondent was served with the petition and citation, but did not appear. The co-respondent filed an answer denying the adultery. On the 28th of November the cause was set down for hearing before the Court without a jury, and on the 23rd of January, 1866, application was made by the respondent to appear in the suit. In support of the application she filed an affidavit, deposing, that on being served with the citation, she went from Dover, where she and her husband resided, to Doctor's Commons to enter an appearance there, but not having the means to pay the fee was unable to do so; that she had applied without success to her husband and his solicitor several times for funds to defend herself, and that it was only within a few days of making the application that she was apprised

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of her real legal position by a solicitor (the solicitor of the co-respondent) whom she had instructed to appear for her. Leave for the respondent to appear and file an answer denying the adultery was granted, and at the same time the co-respondent obtained leave to amend his answer by charging the petitioner with adultery with his wife's sister.

The respondent's costs up to the time of the hearing were, on the 29th of January, taxed at 12*l.* And on the 30th of January an order was made directing payment into court by the petitioner of 70*l.*, the amount reported by the registrar as sufficient to cover the respondent's costs of the hearing, or to give security for the same. This order was served on the petitioner on the 2nd of February, the morning of the trial.

The Court found the respondent, with the co-respondent, guilty of adultery, and the petitioner also guilty of adultery, and dismissed the petition, condemning the co-respondent in the costs incurred by the petitioner in respect of the adultery charged in the petition.

Feb. 3. *Dr. Wambey* applied to the Court to vary the order as to costs. The co-respondent was entitled to the costs incurred by him in establishing the petitioner's adultery, which had resulted in the dismissal of the petition.

Dr. Spinks, contrà.

Feb. 13th. THE JUDGE ORDINARY. In this case I was applied to to condemn the petitioner in the costs of that part of the case which constituted the countercharge made against him by the co-respondent, who established such countercharge. I think the application was reasonable, and that I must condemn him in the costs of that part of the co-respondent's case which was proved; but such costs will not include any expenses incurred in relation to certain other charges made in the answer, on which no evidence was offered.

Feb. 13, & 20. *Dr. Tristram* applied to the Court to order the petitioner to pay the costs of the respondent, and to refer the same to taxation as usual, notwithstanding rule 159 (1866). The new rule, which directs that "When, on the hearing or trial of a

cause, the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial," may be dispensed with. Rule 121 expressly provides that the Judge Ordinary shall in every case in which a time is fixed by the rules for the performance of any act, have power to extend the same. The application had not been made at the hearing in consequence of certain observations made by the Court in a recent case, the import of which had been misapprehended. The affidavit filed by Messrs. Bischoff & Co., the solicitors for the co-respondent, shews that they acted bonâ fide in appearing for the respondent; and if so, they were entitled to have the costs from the petitioner, who would recover them over against the co-respondent. It was not intended by the new rule to deprive the wife of her privileges as to costs, but to give the Court an opportunity of deciding questions as to costs when the facts were fresh in its mind.

Dr. Spinks, for the petitioner, contended that the Court had no power, after the hearing, to order the costs of the wife to be taxed. The 159th rule is imperative. So where a party fails to ask the Court to certify for the costs of a special jury at the proper time, he is afterwards precluded from making such an application: *Skipper* v. *Bodkin*. (1) If the Court has any discretion, it will not exercise it in favour of the respondent; for it is clear she was instigated to appear only to assist the co-respondent.

THE JUDGE ORDINARY. An application was made in this case to allow the wife's costs to be taxed against the husband. It was opposed on the part of the husband, and the new rule (159) was appealed to, as being conclusive against the application. In answer to this argument, it was contended that the rule was one over which the Court had a dispensing power; and rule 121 was cited in support of that view. I am clearly of opinion that the Court is not bound absolutely by the rule. The question, therefore is, whether the present case is one in which the Court should exercise its dispensing power. Now, I think that power ought not

(1) 2 Sw. & Tr. 1; 29 L. J. (P. M. & A.) 133.

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to be exercised except in a meritorious case. The facts of this case were these: the petition having been filed, no appearance was entered by the wife, but an appearance was entered and an answer filed by the co-respondent; and shortly before the hearing an application was made by the wife to be allowed to appear and answer. The court, according to its usual practice, being desirous, whenever anything like a reasonable excuse can be given for a wife's failing to appear earlier in the suit, that she should have that privilege, allowed her to appear and answer. The co-respondent at the same time applied to amend his answer by inserting the charge of adultery, which he afterwards substantiated, against the petitioner. When the matter was before the Court on a former occasion, it desired that an affidavit should be made by the solicitor for the co-respondent, who also appeared for the respondent, and through whose intervention she applied for and obtained leave to answer. That affidavit is now before the Court. The solicitor for the co-respondent is a highly respectable gentleman, and nothing can be said against the propriety of the course he has taken; but it is very plain to me, from his affidavit, that but for him the respondent would never have appeared at all. The adultery was capable of proof, and she never would have contested the suit but for his intervention. It appears that she wrote a letter to the co-respondent tending to shew that she was aware of certain material facts as to the petitioner's conduct, and thus made it necessary that his solicitor should see her. He did see her, he found that she was not defending this suit; and, after taking the advice of a learned counsel, he applied that he might be allowed to defend. I see no impropriety in his taking that course, but in deciding whether her costs should be taxed against the husband, I must consider whether there was really any fair ground for that late appearance on her part. She appeared at the trial by two counsel; but she did not bring any facts before the Court which were not brought before it by the co-respondent, and her case and that of the co-respondent were absolutely identical. No end whatever was served, and justice was not in the slightest degree advanced by her intervention. It was brought about by the attorney of the co-respondent in the interest of the co-respondent, and it may be that the attorney would be able to recover the costs of her intervention

from the co-respondent. I am of opinion that I ought not to cast the costs of her intervention on the petitioner, and I therefore refuse the application.

Attorneys for petitioner: *Bower, Son, & Cotton.*

Attorneys for respondent and co-respondent: *Bischoff, Coxe, & Bompas.*

BACON *v.* BACON.

March 13.

Access to children—Judicial separation—Wife's motion—Costs.

Where the Court had decreed a judicial separation in favour of the husband on the ground of cruelty, and the wife afterwards applied on motion for access to some of the children of the marriage, and an order for access was made:—

Held, that the wife was not entitled to have the costs of the motion taxed against her husband, as he had not refused her access to the children since the date of the decree.

THIS was originally a suit for restitution of conjugal rights, instituted by the wife and resisted by the husband on the ground of her cruelty. The Court found for the cruelty charged, and decreed a judicial separation in favour of the husband.

Dr. Wambey, for the wife, moved that she might have access to two of the elder children of the marriage, and the custody of the two younger ones.

Woollett, for the husband, had no objection to allowing the wife to have reasonable access to the children, but could not consent, she being the peccant party, to her having the custody of any of them.

The Judge Ordinary made an order for access only.

Dr. Wambey asked for the costs of the motion. The wife had applied to the husband for access, and it had been refused by him.

Woollett, contrà. The application for access referred to was made pending the suit. No such application has been made since the decree for judicial separation; if it had been, it would not have been refused. The motion was, therefore, unnecessary. In order to saddle the husband with the wife's costs of the motion, an application for access should have been made and rejected since the date of the decree.

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THE JUDGE ORDINARY. There should have been a distinct refusal of reasonable access by the husband after the decree for judicial separation was made in his favour to entitle the wife to have the costs of this motion taxed against him. I make no order as to costs.

Attorney for petitioner: *W. W. Eaden.*
Attorney for respondent: *J. W. Sparrow.*

March 20.

BELLINGAY *v.* BELLINGAY AND THOMAS.

Decree absolute—Settlement of damages—Time for application.

It is competent to the Court to make an order for the settlement of damages, after the decree nisi has been made absolute.

THIS was a suit for dissolution of marriage, in which the husband had asked for damages, which the jury assessed at 300*l.*, and the Court, on the 6th of December, 1865, pronounced a decree nisi.

Dr. Deane, Q.C., moved for the decree to be made absolute.

Dr. Spinks, for the respondent, asked that the damages should be settled on the respondent and the children of the marriage. No notice of the intended application had been given to the petitioner; if he desired time in order to oppose it, the motion for the decree to be made absolute should be adjourned.

THE JUDGE ORDINARY. There is nothing in the words of section 33 of the Divorce Act to preclude the Court from settling the damages after the decree nisi has been made absolute. I will make it absolute to-day, and the application for the settlement of the damages may be made on a future occasion.

Proctor for petitioner: *W. B. Abbott.*
Attorneys for respondent: *Stibbard & Beck.*

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April 26.

20 & 21 *Vict. c.* 85, *s.* 23—*Judicial separation—Decree made in the absence of respondent—Petition for reversal.*

A petition for the reversal of a decree of judicial separation under the 23rd section of the 20 & 21 Vict. c. 85, on the ground that it was obtained in the petitioner's "absence," is good on demurrer, although it alleges personal service on the petitioner of the citation in the judicial separation suit; for the word "absence" means non-appearance in the suit, and not absence without knowledge or notice of the suit.

It is not sufficient in such a petition to allege merely the non-appearance of the petitioner, but the petition must further set out the cause of his non-appearance, and must also state circumstances tending to shew that the decree was wrong on the merits.

THIS was a petition presented under the 23rd sec. of the 20 & 21 Vict. c. 85 (1), for the reversal of a decree of judicial separation. The original petition was by a wife for judicial separation on the ground of cruelty. The respondent was personally served with the citation and a copy of the petition, but did not enter an appearance. On the 9th June, 1865, the Judge Ordinary having taken the oral evidence of the petitioner, and of the witnesses produced on her behalf in support of the petition, and having heard counsel on her behalf thereon, *in default of the appearance of the respondent* decreed a judicial separation by reason of his cruelty, and condemned him in costs, and ordered that the petitioner should have the custody of the children of the marriage.

The petition for the reversal of the decree alleged that the husband had been personally served with the citation and petition,

(1) "Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may at any time thereafter present a petition to the court, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and the reversal thereof."

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but that he was ignorant of the course of practice of the court; that he had not a legal adviser, or legal assistance during any part of the time when the proceedings were pending, as he did not consider the same necessary; that he determined to defend himself, feeling assured that he had a satisfactory answer to the petition; that he had no notice of the hearing of the petition which he was in the expectation of receiving, as he had been served personally with other notices and summonses in the suit, and he was consequently in ignorance of its coming on for trial, and therefore could not attend the hearing which he had fully intended to do, and to oppose the petition; and that the decree was consequently made in his unavoidable absence; that he only heard of the decree being pronounced from a friend who saw a report of the case in a newspaper; that if he had been able to attend the hearing he could have disproved the allegations contained in the petition; and that he was not guilty of the acts of cruelty and misconduct alleged. The petition then went on to traverse the respective allegations in the original petition, and to allege facts tending to shew that the separation between his wife and himself had not been caused by any misconduct on his part. The wife in her answer demurred to the petition, and also, by leave of the Judge Ordinary, traversed it. The demurrer was argued before the Judge Ordinary on the 13th March, by Dr. Spinks for the wife, and Willis for the husband. On the 20th March, the Judge Ordinary directed it to be re-argued before the full Court, and on the 26th April it came on for argument accordingly. (1)

Dr. Spinks, for the demurrer. The question is, what is the meaning of the word "absence?" The husband having been personally served was not "absent" within the meaning of the section. In the form of petition for reversal of decree given in the appendix to the rules and orders, absence is treated as absence without knowledge of the suit. "3. That the aforesaid decree was obtained in the absence of your petitioner. (*State facts tending to shew that the petitioner did not know of the proceedings; and further that had he known of them he might have offered a sufficient defence.*)" It cannot have been intended that mere physical

(1) Before the Judge Ordinary, Keating, J., and Mellor, J.

absence from the court during the trial should be sufficient ground for the petition. There is no limitation as to the time when the petition may be presented, so that unless absence means absence without knowledge, a respondent with full knowledge of the proceedings, and of the evidence which has been produced against him, may lie by for any number of years until all the witnesses are dead and then present the petition. The section specifies two grounds of reversal: 1. that the decree was obtained in the respondent's absence; 2. that there was reasonable ground for desertion where desertion was the ground of the decree. So that where the decree is founded on adultery or cruelty the Court is apparently bound to reverse it if it was made in the petitioner's absence, without going into the merits of the case or inquiring whether it was rightly made. The section was probably intended to meet cases in which the Court under s. 42 had dispensed with personal service, and the decree had been obtained behind the back of the respondent.

[KEATING, J. Suppose an Ecclesiastical Court had been satisfied that the absence of a respondent, who had been personally cited, had arisen from some cause beyond his control, would it have reheard the case?]

It had no power to do so, and where there had been personal service the judgment was conclusive both upon the party and upon the Court. *In the Goods of Robinson.*(1) [As to the practice of the Scotch Courts he cited Bell's Law Dictionary; 11 Geo. 4, & 1 Wm. 4, c. 69, ss. 33 & 36; Fraser's Husband and Wife, p. 705; 1 Shand's Practice of the Court of Session, 424.]

Willis, for the petitioner. Without any express provision in the act it would be necessary, according to the practice of all courts, that notice of the proceedings should be given to every one affected by them. In other suits than those for judicial separation service must be effected, although this section does not apply to them, and if absence means absence without notice the section is unnecessary. A decree pronounced without notice of the suit having been given to the respondent would be invalid, and that part of the section which gives validity to acts done by the wife before the reversal of the decree does not apply to it.

(1) 3 Phill. 511.

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[THE JUDGE ORDINARY. A judicial separation would be worth little or nothing if it did not place the wife in the position of a feme sole. But your argument is that she might be a feme sole for two or three years and make bargains right and left, and that if the husband then made his appearance the decree would be set aside, and all the innocent people with whom she had contracted would suffer.]

Yes, if the husband had no notice of the proceedings.

[MELLOR, J. And if he is served with a citation and petition indicating the ground on which the wife seeks for a decree, and through ignorance or a determination to manage his own case he does not appear and oppose it, is he to be allowed at any time to pray for a reversal of the decree on the ground that it was made in his absence?]

Yes, for absence does not necessarily mean absence without knowledge of the proceedings. The word absence is seldom used without explanatory words, such as "absence beyond seas," or "temporary absence," or "absence from sickness." In its technical sense and standing alone it signifies merely "want of appearance." Even if the respondent had been present in court when the decree was made he would have been absent within the meaning of the section, because not having entered an appearance he would not have been allowed to take part in the proceedings. [As to the meaning of the word he cited Dwarris on Statutes; Johnson's Dictionary; Ayliffe's Parergon, p. 15; Wharton's Law Lexicon; Burrell's Law Dictionary; Bell's Dictionary; Coote's Practice of the Ecclesiastical Court, 817; 33 Henry 8, c. 20; *Reg.* v. *Simpson* (1); Cicero, First Philippic.] The wife cannot complain of any hardship, for the husband has to pay all the costs of the proceedings, and the burden of proving that the decree has been improperly obtained is cast upon him. In this case the husband did not wilfully abstain from appearing, and he alleges that he always intended to oppose the petition, and that he has a good defence to it upon the merits.

Dr. Spinks, in reply. The meaning of the word must be gathered from the whole of the act, and the Court will not put an interpretation on the section which would lead to absurd and unjust consequences. It would be unjust and absurd to hold that

(1) 10 Mod. 341.

a husband might be personally present in court and hear the whole of the evidence against him, and take no step for two or three years, until his wife was in good circumstances, and some of the witnesses against him were dead, and might then present a petition to reverse the decree, and produce witnesses to prove that he had not been guilty of the misconduct imputed to him. The same rule must be applied to a petition for reversal by a wife, and in that case the husband would have to pay the costs of the two suits instead of one.

THE JUDGE ORDINARY. The question in this case turns entirely upon the construction to be given to the 23rd section, which has never yet received judicial interpretation. The able arguments on both sides shew how extremely obscure is the meaning of the section, and how difficult, not to say impossible, it is to put a perfectly logical construction upon it; but the Court is bound to construe it, and, as far as it can, to make it available for carrying out the objects of the legislature, and for doing justice between the parties. I conceive that the argument on both sides has been pressed too far. I think the contention on the part of the wife that the word "absence" means "absence without citation," and that only, is too wide. The argument on the other side is, that the word absence means that the party has not appeared, and that provided the petitioner can shew that he was absent in that sense when the decree was obtained, and that the decree was improperly obtained, he is, without going any further, entitled to succeed. I think that argument also goes too far. The only construction satisfactory to my mind which can be put on the section is something between the two, namely, that where the respondent has not in fact appeared, he may present a petition under this section; that in his petition he must state the reasons of his absence, and the ground on which he asks to be relieved from the results of it; in other words, he must state how it happened that the decree was obtained in his absence, and he must explain the circumstances that gave rise to his absence; and that he must further state circumstances calculated to satisfy the Court that the decree was wrong. The Court may then, upon a review of all the matters alleged and proved, proceed to reverse or to affirm the decree, but in coming to a decision it will be at liberty to consider how far the absence

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of the petitioner was his own fault or was excusable, and whether he has taken reasonably prompt steps for his relief. This being in my opinion the meaning of the section, I hold that although the petition does not allege that the petitioner was absent without citation, it is not for that reason bad on demurrer.

It is further necessary to see whether the circumstances stated in the petition are sufficient to justify the Court in allowing the petitioner to proceed. The Court will not examine the statements in the petition very narrowly with that view, because when it comes to the proof it will be necessary to satisfy the Court as to the matters I have pointed out. I think that the circumstances stated in the petition are sufficient, putting a liberal construction upon them, to justify the Court in allowing the suit to proceed. I hold, therefore, that the demurrer cannot be sustained.

KEATING, J. I am of opinion that the absence contemplated by the section is not the want of service, but the non-appearance of the respondent. I entirely concur with the Judge Ordinary in the construction he has put upon the section. It is, I think, absolutely necessary that the circumstances under which the absence took place, should be set out in the petition, and the sufficiency of the alleged cause of absence must always be a question for the consideration of the Court, when it comes to decide on the merits of the petition. If Mr. Willis's argument were adopted to the full extent, and it were sufficient to allege the fact of non-appearance, although such non-appearance might be wilful and contumacious, it would lead to intolerable hardship, for the wife would never know whether she was properly separated from her husband or not, and he might lie by hoping to take advantage of subsequent occurrences for the perpetration of the grossest injustice. The petition in this case has been properly framed, because it goes into the causes of the non-appearance of the petitioner. I think that the fair result of the allegations contained in it is, that he was guilty of the folly of being his own counsel, and did not know the proper course to take in order to defend the suit, and I agree that he ought to be allowed the opportunity of proving the facts which he alleges.

MELLOR, J. For the present purpose it is not necessary to express an opinion upon the real merits of the causes assigned for

the petitioner's non-appearance, as that will be a matter for the consideration of the Judge Ordinary, when the petition comes before him. I confess I had some difficulty in yielding, but I do now yield entirely to the view taken by my learned Brothers of the construction of this section. Having to construe a statute that presents so many difficulties, and desiring to make it available for the purposes for which it was intended by the legislature, the conclusion at which they have arrived is, I think, the best calculated to effect that object. I was for some time disposed to think that the word absence, meant absence from the proceedings altogether, and without notice of them, but the ingenious argument of Mr. Willis, has satisfied me that I was mistaken. The vast importance of compelling appearances in all proceedings, has at all times been felt by the courts, and various expedients have been adopted for the purpose of getting rid of the difficulties, caused by want of appearances. Absence in the sense of non-appearance, is therefore a well known and well understood condition of things, and I think that is the sense in which it is used in the section, for although the petitioner was served with the citation, he was absent for all the purposes of the suit, as by not appearing, he was unable to take any part in the proceedings. The argument of Mr. Willis, if carried to the full extent, would produce serious mischief, but the construction put upon the section by the Court, will, I think, go far to obviate all the difficulties that have been suggested. Every presumption is in favour of the decree, and although we might be doing injustice if we prevented the petitioner from having a locus standi to impeach it, the Judge Ordinary in his judicial discretion will take care not to set it aside, unless a bonâ fide case for his interference is made out.

THE JUDGE ORDINARY. The Court wishes it to be understood that it does not hold that it may not have the same power of setting a mistake right, independently of the section, and in cases to which the section does not apply, as it has under the section. All it determines is that the petition now before it is good on demurrer. What terms the Court may in this or any other case impose as to the payment of the costs of the first and of the second suit is another matter.

Judgment for the petitioner.

Attorney for petitioner: *J. Mote.*

Attorneys for respondent: *Risley & Stoker.*

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May 22.

ANQUEZ *v.* ANQUEZ.

Restitution of Conjugal Rights—Answer, alleging Deed of Separation.

Although a deed of separation is no bar to a suit for restitution of conjugal rights, it may be alleged in answer to an allegation in the petition, that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner.

THIS was a petition by a wife for a restitution of conjugal rights. The petition alleged that the respondent has ever since the 29th day of March, 1858, without any just cause refused and still refuses both to permit your petitioner to cohabit with him and also to render him conjugal rights. The respondent filed an answer in which he alleged: "1. He denies that he has ever since the 19th March, 1858, without any just cause refused to permit the petitioner to cohabit with him as alleged in the third paragraph of the petition, for he saith that on or about the 13th March, 1858, the petitioner and respondent mutually agreed to live separate and apart, and that by a deed of separation bearing date on the 19th March, 1858, the respondent covenanted and agreed to pay to John White, the father of the petitioner, as her trustee, the sum of 39*l.*, per annum, by weekly instalments of 15*s.*, but that such deed contained a proviso for the suspension of such annuity in case of the default by the petitioner, or her trustee, to furnish to the respondent upon his written request the said petitioner's place of residence; that in pursuance of such proviso the respondent on or about the 26th of October, 1865, caused a written demand of the petitioner's place of residence to be served at Calverts Building, High Street, in the borough of Southwark, and also to be served upon John White, the petitioner's trustee. That no answer whatever has been received by the respondent, but that instead thereof the respondent was served on the 24th of January last with the petition and citation in this suit although no application whatever had been previously made to the respondent to cohabit with the petitioner, and although she had, on or about the 19th of March, 1858, assented to and signed the said deed of separa-

tion." The answer then went on to allege that the petitioner had been guilty of cruelty and of adultery, and prayed for a dismissal of the petition and for a decree in favour of the respondent, giving him such relief in the premises as he might be entitled to by law.

F. H. Lewis moved that the answer might be amended by striking out the first paragraph. A deed of separation is no bar to a suit for restitution: *Spering* v. *Spering.* (1)

Dr. Spinks, contrà. It is not pleaded as a bar but as an answer to the allegation that the respondent has without just cause refused to permit the petitioner to cohabit with him ever since the 19th of March, 1858. The deed of separation is a material fact in the case, and the Court should be informed of the whole history of the parties before it is called upon to pronounce a decree.

F. H. Lewis. The plea is one to which we cannot reply. We cannot take issue on it, and if it is left without a reply, it will stand upon the pleadings as a good answer to the petition.

THE JUDGE ORDINARY. The answer is good as it stands. It is a mistake to speak of it as a plea to a declaration. It is an answer, verified by oath, setting out the circumstances under which the husband claims to resist the wife's petition. The question is, whether the matter contained in the first paragraph is material to that end. It is quite clear that a deed of separation is no answer to a suit for restitution. But there is abundant matter in the rest of the answer, if it can be proved, to relieve the husband from the necessity of taking back his wife; and the answer does not, therefore, rest on the first paragraph. The petitioner alleges that ever since a certain date the respondent without any just cause has refused to permit her to live with him. The petitioner was not bound to make that allegation. It would, I apprehend, have been sufficient if she had alleged that he now refuses to live with her. But the allegation having been made he ought to be allowed to explain that they ceased to live together in pursuance of an agreement to which she assented. Whether the matter is in any way material cannot be determined until the

(1) 3 Sw. & Tr. 211; 32 L. J. (P. M. & A.) 116.

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evidence is before the Court, but the first paragraph is a good answer to the allegation in the petition, and it may turn out to be material. I therefore reject the motion to strike it out.

Attorneys for petitioner: *Lewis & Lewis.*
Attorneys for respondent: *Gregory, Champion, & Erdy.*

June 19.

WILLIAMS *v.* WILLIAMS.

Judicial Separation—Cruelty—Answer—Deed of Separation—Sincerity of Suit.

In answer to a petition for judicial separation on the ground of cruelty, the respondent pleaded a traverse and condonation, and further alleged that the petitioner had consented to a deed of separation, and that the suit was not instituted bonâ fide, but for the purpose of obtaining an increased allowance. The Court refused to order these allegations to be struck out.

An allegation that by reason of the deed of separation the petitioner was not entitled to institute the suit, was ordered to be struck out.

THIS was a wife's petition for judicial separation on the ground of cruelty. The respondent in his answer, first, traversed the cruelty charged; secondly, alleged condonation; and thirdly, further alleged that on the 16th of February, 1865, the petitioner with the advice of her solicitor had executed a deed of separation, whereby the respondent covenanted to allow her to reside apart from him, and to retain and dispose of her jewels, plate, and clothes, and to pay her an allowance of 50*l.* a year; that he had performed all the covenants of the deed, and no act of cruelty was charged against him subsequent to the date of the deed, and that by reason of the premises the petitioner was not entitled to sue for a judicial separation. Fourthly, he further alleged that the petition had not been filed for the bonâ fide purpose of obtaining the protection of the Court, but for the purpose of extorting from him a larger amount of maintenance than was payable to her under the deed, and that before the petition was presented her solicitor had applied to his solicitor for an increased allowance, and he prayed that the petition might be dismissed.

Inderwick moved that the third and fourth paragraphs of

the answer might be struck out. As to the third paragraph the Court cannot take notice of a deed of separation. As to the fourth paragraph it is no answer to the petition.

Dr. Spinks, contrà. Although it has been held that a deed of separation is no answer to a suit for restitution, or to a suit for judicial separation on the ground of adultery, it has never been held that it is no answer to a suit for judicial separation, or for divorce a mensâ et thoro, on the ground of cruelty. It may be said that having elected her own remedy and consented to a deed of separation as a sufficient protection from the cruelty of which she complains, she is not entitled to ask the protection of the Court. As to the fourth paragraph it has been held that want of sincerity is an answer to the suit: *Matthews* v. *Matthews*. (1)

THE JUDGE ORDINARY. This objection is not taken by way of a demurrer to an entire pleading, so as to make it necessary to determine whether that pleading is an answer to the petition, but it is an application to strike out some of the paragraphs in an answer, there being other paragraphs to which no objection can be taken. After the decision in *Matthews* v. *Matthews* (1), the Court cannot reasonably say that the existence of the deed and the conduct of the petitioner at the time when the arrangement was entered into, and since that time, are not facts which the Court ought to investigate in this suit. On the other hand it is plain that the deed does not operate as an estoppel. I think the proper course will be to allow the third and fourth paragraphs to stand, and to direct the words "that by reason of the premises the petitioner is not entitled to sue for a judicial separation" to be struck out.

Attorney for petitioner: *J. May.*

Attorney for respondent: *Crowley & Co.*

(1) 1 Sw. & Tr. 499; 29 L. J. (P. M. & A.) 118; affirmed on appeal, 3 Sw. & Tr. 161; 29 L. J. (P. M. & A.) 120.

June 19.

WILSON *v.* WILSON, THE QUEEN'S PROCTOR INTERVENING.

Intervention of Queen's Proctor—Costs of unsuccessful Intervention— 23 & 24 *Vict. c.* 144, *s.* 7.

The court has no power to condemn the Queen's Proctor in the costs of an unsuccessful intervention under the 7th section of the 23 & 24 Vict. c. 144.

THIS was a petition by a wife for a dissolution of marriage. The respondent filed an answer denying the allegations in the petition. The cause was heard before the Judge Ordinary by a jury; a verdict was found for the petitioner, and a decree nisi was pronounced. The Queen's Proctor afterwards intervened under the 7th section of the 23 & 24 Vict. c. 144, under the direction of the Attorney General, and by leave of the Court, and pleaded that the petitioner had been guilty of collusion and of the suppression of material facts, and of adultery. The petitioner denied these charges, and the issues were tried by the Judge Ordinary without a jury. The charge of collusion was abandoned, and the Judge Ordinary, after hearing evidence on the other charges, came to the conclusion that the Queen's Proctor had failed to establish them, and that the decree nisi must stand.

Dr. Swabey, for the petitioner, moved for a decree absolute, and for an order condemning the Queen's Proctor in the costs of the intervention. It would be a great hardship to hold that the petitioner cannot obtain the costs of proving her innocence from the Queen's Proctor. In this case, as he did not prove collusion, he is in the same position as one of the public who has unsuccessfully intervened.

[THE JUDGE ORDINARY. In *Lautour* v. *Lautour, the Queen's Proctor intervening* (1), the House of Lords held, that although he had not proved collusion, and was in the same position as one of the public, the Court had no power under the 7th section of the 23 & 24 Vict. c. 144 to order his costs of proving the petitioner's adultery to be paid by the petitioner.]

All Courts have a general authority to make what order they

(1) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89.

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please as to costs. The decision in *Lautour* v. *Lautour* (1) was upon the words of the section, without reference to that general power; and the question there was not whether the Queen's Proctor should be condemned in the costs of an unsuccessful intervention, but whether the petitioner should be condemned in the costs of a successful intervention.

[THE JUDGE ORDINARY. If the section does not give the power for which you contend, where does the Court get the power? The 51st section of 20 & 21 Vict. c. 85 does not give it. That section applies only to the parties to the suit, and not to interveners, because interveners did not exist at the time when the act was passed.]

The House of Lords did not distinguish between the two characters of the intervener as one of the public and as Queen's Proctor. Having failed to prove collusion, he was one of the public. He referred to *Boulton* v. *Boulton and Page* (2), *Gray* v. *Gray* (3), *Forster* v. *Forster and Berridge.* (4) In the last case, one of the public who intervened unsuccessfully was condemned in the costs of his intervention.

[THE JUDGE ORDINARY. That case was decided before *Lautour* v. *Lautour.* (1)]

The Solicitor General and *Dr. Spinks,* for the Queen's Proctor. The Queen's Proctor intervened as a public officer representing the Crown. He could not have intervened without the direction of the Attorney General. The general rule is that the Crown cannot pay or receive costs, and although certain exceptions to this rule have been made by statute (18 & 19 Vict. c. 90), this is not one of the excepted cases. The 7th section enacts that he is to have his costs if he proves collusion, but not that he is to pay costs if he does not prove it. Having intervened and alleged collusion as Queen's Proctor, his intervention does not cease to be that of Queen's Proctor because he does not prove collusion. But even if he is on the same footing as one of the public when he fails to prove collusion, *Lautour* v. *Lautour* (1), in which the whole question

(1) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89.

(2) 2 Sw. & Tr. 551; 31 L. J. (P. M. & A.) 76.

(3) 2 Sw. &. Tr. 554.

(4) 3 Sw. & Tr. 151; 32 L. J. (P. M. & A.) 206.

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was fully discussed, is an authority that the Court can make no order as to costs. He referred to *Rogers* v. *Rogers*. (1)

THE JUDGE ORDINARY. I think this question has been decided by the highest tribunal, and on the authority of that decision I refuse the application for costs. In *Lautour* v. *Lautour* (2), the Lord Chancellor pointed out that the 7th section consists of two parts, one of which applies to the case of one of the public intervening or rather interfering (I use that word to distinguish it from the intervention of the Queen's Proctor) to prevent a decree being pronounced to which the petitioner is not entitled, and the other to the intervention of the Queen's Proctor in his official capacity. The late Judge Ordinary seems to have been of opinion that he had power under the act of 1857 to award costs to the successful party in cases arising under the 7th section of the act of 1860, and acting on that opinion he made an order in *Lautour* v. *Lautour* (2), that the Queen's Proctor should have his costs. In that case the Queen's Proctor had intervened and had filed a plea alleging collusion, and the suppression of material facts, and the adultery of the petitioner. He therefore took identically the same course as he has taken in this case. There was an appeal from the decree of the Judge Ordinary to the House of Lords. No doubt the decree of the House of Lords is binding upon all other courts, but it has often been said, and I think correctly, that everything that falls from the noble and learned Lords in giving judgment is not so binding. The Court must therefore look at the thing done by the House of Lords rather than at the reasons given for doing it. In that case the Judge Ordinary having condemned the petitioner in the costs of the intervention, the House of Lords decided that he had no power to make such an order. The case is precisely the same as the present, and if the adultery in this case had been proved, and I had condemned the petitioner in the costs of the Queen's Proctor, I should have done precisely what Sir C. Cresswell did in *Lautour* v. *Lautour* (2), and should have acted in direct opposition to the decision of the House of Lords in that case. The question I have to decide therefore resolves itself into this, whether the issue of

(1) 31 L. J. (P. M. & A.) 101.
(2) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89.

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adultery not having been proved, the Court has power to condemn the Queen's Proctor in costs, though, if the adultery had been proved, the petitioner would not have been so condemned. That question is hardly susceptible of argument. The Queen's Proctor is certainly not more liable to costs than other persons, and it is obvious that as the statute does not give me power to condemn the petitioner in costs, it does not give me power to condemn the Queen's Proctor in costs. I make the decree absolute, and I feel bound by the decision in *Lautour* v. *Lautour* to reject the application for an order as to costs. Whether, if I had the power, this case would be a proper one in which to exercise it, is a question which it is not necessary to determine.

Attorney for petitioner: *Preston & Dorman.*
The Queen's Proctor.

IN THE GOODS OF COSNAHAN.

April 24.

*Administration with will annexed—Deed of gift treated as testamentary by foreign court—Foreign grant followed by the English court—Grant to person not primarily entitled—*20 & 21 *Vict. c.* 77, *s.* 73.

Prv 450.

The English Court of Probate follows the grant of the court of the testator's domicile, as to the document which that court has admitted to probate, but not as to the person to whom the grant is made.

A testator domiciled in the Isle of Man executed a deed conveying the whole of his property to a trustee upon trust after his decease to realize and invest it, and to pay the annual income to his widow for her life, and upon her death to divide it amongst his children. This document was duly executed as a will, and the Ecclesiastical Court of the Isle of Man granted probate of it to the trustee as executor according to the tenor. The Court of Probate followed the Isle of Man grant so far as to admit the document to probate, without inquiring whether or not it was testamentary, but not so far as to make the grant to the trustee as executor according to the tenor. Being satisfied that the testator intended to deprive the widow who was primarily entitled to the grant, of any control over the administration of the estate, the Court decreed administration with the will annexed to the trustee under the 73rd section of the 20 & 21 Vict. c. 77.

JAMES COSNAHAN, late of Douglas, in the Isle of Man, deceased, made and executed a deed to the following effect:—

"This indenture, made and executed on the 2nd of November, 1865, by and between James Cosnahan, of the town of Douglas,

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and with the full concurrence of Jane Cosnahan, testified by her becoming an executing party hereto, of the first part; and Richard Quick, of the said town, innkeeper, of the second part, witnesseth that the said James Cosnahan, in consideration of the natural love and affection which he hath and doth bear towards the said Jane Cosnahan, and in further consideration of the several trusts hereinafter mentioned, and of the sum of 5s. to him paid by the said Richard Quick at or before the execution hereof, the receipt whereof is hereby acknowledged, hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, and for ever absolutely sell unto the said Richard Quick all and singular the whole of the dwellinghouses, yards, and premises, situate, &c., together with all other real and personal property belonging to the said James Cosnahan, whatsoever and wheresoever the same may be, to hold the same with all rights, privileges, easements, and appurtenances to the same respectively appertaining or belonging, unto the said Richard Quick, his heirs, executors, administrators, and assigns, in trust . . . . . upon the decease of James Cosnahan, to let the said real property on lease or otherwise as to the trustee may appear most advisable, and to invest upon real security such portion of the personal estate as may not be already invested, and receive and take the rents, issues, and profits arising from such investments, and to pay over the same unto the said Jane Cosnahan for and during the term of her natural life; and upon her decease in trust to divide the whole of such trust property equally among such of the children of the said Jane Cosnahan as shall be living at the time of the decease of the said Jane Cosnahan, and in case any such children shall have previously departed this life leaving lawful issue, such issue to be entitled to their deceased parent's share, and such portions as shall fall to the share of any daughter shall be free from the control of any present or future husband . . . . and it is hereby agreed upon that the said Richard Quick, his heirs, or assigns, or any succeeding trustee under the deed, shall have a right, with the consent of the said Jane Cosnahan, to sell and dispose of the whole or any part of the household furniture, and also of the real property hereby conveyed, and either by public auction or private treaty, as may appear most advisable, and after the payment of

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all charges and expenses, invest the proceeds arising from such sale upon the security of real property, and hold the same upon the same trusts as are declared of and concerning the said real property; and it is hereby declared and agreed upon that all and every person or persons paying to the said trustee any trust money belonging to the said estate, and taking his receipt for the same, shall be fully and effectually released and discharged from all responsibility and accountability as to the due application thereof. Now it is hereby further declared and agreed upon that . . . it shall be lawful for the said James Cosnahan at any time during his life by deed by him duly executed to revoke, annul, and make void the whole or any of the trusts in and by this deed created, and to declare new and other trusts respecting the property hereby conveyed."

The deed was signed and delivered by James Cosnahan, Jane Cosnahan, and Richard Quick, in the presence of Margaret Christian, and Jane Isabella Christian, who attested it. James Cosnahan died at Douglas on the 2nd of November, 1865, leaving his widow Jane Cosnahan surviving him, and on the 16th of March, 1866, the Court of the Archdeacon of the Isle of Man and of Sodor and of Sodor and Man granted probate of the deed to Richard Quick as executor according to the tenor. An office copy of the deed was filed, upon which was the following endorsement:—"At an Ecclesiastical Court holden at Douglas this 16th day of March, 1866, the original deed of sale in trust granted by James Cosnahan, deceased, to Richard Quick, of Douglas, having been proved before and captioned by a high bailiff, and registered in the registry office for deeds according to law (of which the foregoing is the usual examined office copy), and James Cosnahan, the grantor having departed this life, at the petition of R. Quick, the grantee therein named as executor according to the tenor of the same, is accepted by this Court as and for the last will and testament of the said James Cosnahan, deceased, and the said R. Quick is sworn," &c.

Searle, moved for probate of the deed. A doubt has been suggested in the registry whether it is testamentary, but it is unnecessary to consider that question, for the deceased being

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domiciled in the Isle of Man, the Court will follow the grant made by a court of competent jurisdiction in the country of the domicile. If R. Quick is not entitled to the grant as executor according to the tenor, it can be made to him as universal legatee in trust.

SIR J. P. WILDE. The Court will follow the Isle of Man grant so far as to treat the deed as testamentary, but not so far as to treat the trustee as executor according to the tenor. I think he is not entitled to the grant either in that character or as universal legatee in trust. The widow is primarily entitled to administration with the will annexed, but as the testator evidently intended to exclude her from any control over the estate, and to give it to the trustee, I will carry his intention into effect by making the grant of administration with the will annexed to Mr. Quick under the 73rd section of the Probate Act. (1)

Attorney: *Gray.*

May 8.

IN THE GOODS OF YOUNG.

Administration bond—Sureties—Bond assigned by the Court—20 & 21 *Vict. c.* 77, *s.* 83—*Leave to appeal.*

The Court will order an administration bond to be assigned, upon being satisfied that the application for the order is made bonâ fide, and upon a primâ facie case being made out by the applicant, that the condition of the bond has been broken, and that he is entitled to sue the administrator for the breach.

Where the alleged breach of the condition of an administration bond was that the administrator had not paid any part of the personal estate of the intestate to one of the next of kin, and the only question in dispute was, whether the applicant was one of the next of kin, the Court directed the bond to be assigned to him upon condition that he would consent to an order that no execution should issue at common law, but that the money, if any, recovered by the judgment should be paid into the registry.

Leave to appeal refused.

JAMES YOUNG, late of 19, Arlington Street, Camden Town, in the county of Middlesex, died on the 7th of December, 1857, a bachelor, without parent, or brother or sister, uncle or aunt, nephew

(1) 20 & 21 Vict. c. 77.

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or niece, and intestate. On the 15th of October, 1858, a grant of administration of his estate and effects was made to W. R. Bond, of Cincinatti, in the State of Ohio, as the attorney of Rebecca Gardiner, widow, then resident in Cincinatti, the lawful cousin-german of the intestate, for her use and benefit. The administrator entered into the usual bond to the judge of the court for the administration of the estate with two sureties, George Peabody and Charles Cubitt Gooch. On the 1st of May, 1866, a rule nisi was granted, on the motion of Dr. Spinks, for an order under the 83rd section of 20 & 21 Vict. c. 77, that the bond might be assigned to Frederick Lester, claiming to be the lawful cousin-german and one of the next of kin of the intestate, in order that he might sue the sureties thereon in a court of common law. Affidavits were filed shewing that the administrator, after paying the funeral and testamentary expenses and the debts of the intestate, had paid over the residue of the estate to Rebecca Gardiner, as the sole next of kin. An affidavit had also been filed by F. Lester, setting out the pedigree by which he supported his claim to be one of the next of kin of the intestate, and an affidavit in answer had been filed by the attorney for the sureties, stating that he had made inquiries into the allegations contained in the affidavit of F. Lester, and he did not believe them to be true.

The Queen's Advocate, and *Dr. Wambey*, shewed cause against the rule. The interest of F. Lester is denied, and he ought to be called upon to prove it before the bond is assigned. This Court, like the Ecclesiastical Court, has a discretion as to assigning the bond, and in the exercise of that discretion it ought not to make the order until it is reasonably satisfied that the bond has been broken. In this case it is conceded that the bond has not been broken unless F. Lester is one of the next of kin. They referred to *Sandrey* v. *Michell* (1); *In the Goods of Jones* (2); *Baker and Marshman* v. *Brooks* (3); *Crowley* v. *Chipp* (4); *The Archbishop of Canterbury* v. *Tubb* (5); *Drewe* v. *Long*. (6)

[SIR J. P. WILDE. I must be guided by the decisions of my

(1) 3 Sw. & Tr. 25; see also 32 L. J. (Q.B.) 100.
(2) 3 Sw. & Tr. 28.
(3) 3 Sw. & Tr. 32.
(4) 1 Curt. 456.
(5) 3 Bing. N.C. 789.
(6) 1 Ecc. & Ad. 391.

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learned predecessor, and the three cases before him which have been cited satisfy me that the Court ought not to require more than that a primâ facie case should be made out before assigning the bond. The cases in the common law courts only shew that this Court has the same discretion as the Ecclesiastical Court, and that a mandamus would not be granted to compel it to assign a bond. If there is a primâ facie case made out, I shall make the order.]

Dr. Spinks, in support of the rule. The matter was very fully considered in *Younge* v. *Skelton* (1), and Sir John Nicholl said: "The Ecclesiastical Court, when cases of this nature have been properly considered, has never, I conceive, decided whether there has been a breach of the bond or not; it avoids prejudicing either party." All we now ask for is an opportunity of raising the question whether there has been a breach of the bond. The affidavit of the applicant is sufficient to make out a primâ facie case.

SIR J. P. WILDE. I shall follow the decisions of my learned predecessor, in which I entirely concur. The statute does not mean that the applicant is to try the same question twice over, first in this court and then in a court of common law. It means that the Court ought to exercise its discretion by seeing that the application is bonâ fide, that a primâ facie case is made out, and that the applicant is the proper person to whom the bond should be assigned. I think that the affidavit of the applicant setting out all the steps of the pedigree does make out a primâ facie case, and I order the bond to be assigned to him. But, lest any wrong should be done to the sureties by any other question being raised in the common law court than the question whether the applicant is one of the next of kin, I shall make it a condition of that order that the applicant shall consent to an order that any money recovered on the bond be paid into this court. Before it is paid out to the applicant the Court must be satisfied that the only question he raised in the common law court was whether he is the next of kin.

The Queen's Advocate asked whether the applicant could be ordered to give security for costs.

(1) 3 Hagg. Ecc. 780.

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[SIR J. P. WILDE. No; he is resident in this country.]

Order, that the bond be assigned to F. Lester, and by consent that no execution be issued at common law, but that the sum, if any, recovered by the judgment be paid into this court.

June 5. *The Queen's Advocate* and *Dr. Wambey* moved under the 39th section of the 20 & 21 Vict. c. 77, for leave to appeal from the order to the House of Lords.

Dr. Spinks, contrà.

SIR J. P. WILDE. I think I ought not to allow this appeal for many reasons. One of them is, that the order does not decide any question as to the rights of the parties, but merely deals with the question of procedure. The only result of an appeal would be to put both parties to great expense, which one of them may not be able to meet, and the question in dispute would still remain undecided. I reject the motion with costs.

Proctors for the applicants: *Toller & Sons.*

Attorneys for the sureties: *Pilgrim & Phillips.*

IN THE GOODS OF DALLOW.

May 29.

Will—Signature at foot or end—Clause following signature—Incorporation by reference.

A will contained a reference to executors "hereinafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature:—

Held, that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed.

RICHARD DALLOW, late of Wolverhampton, died on the 26th of February, 1866, leaving a will dated the 5th of September, 1865. The will commenced as follows:—

"I leave to my dear wife for her life the whole of my household furniture, linen, plate, and everything connected therewith, or any part she may choose, and I further leave to my wife 100*l.* a year

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IN THE GOODS OF DALLOW.

for her life to be paid out of rents and other moneys received by *my executors as hereinafter named.* And I leave to my wife, &c."

The will then went on to dispose of the rest of the testator's property, and contained several references to his executors, but did not name them. Immediately underneath the testator's signature and in a line with the signatures of the attesting witnesses there was this clause:—"My executors are W. A. Dallow, Cleobury Mortimer, and my brother John Dallow."

One of the attesting witnesses filed an affidavit, in which he stated that the testator read over the will to him, including the clause appointing executors following the signature, before the execution and that the clause was written before the will was signed and attested.

Pritchard (May 8) moved for probate of the will to W. A. Dallow and J. Dallow, as executors. As the clause appointing executors is underneath the signature, effect cannot be given to it by virtue of the signature (1), but the reference in the will, "my executors as hereinafter named," incorporates it, and it is therefore entitled to probate. The only question is, whether these words sufficiently describe and identify the clause to admit parol evidence that it was in existence at the time when the will was executed. The reference in the will is sufficient to incorporate the clause: *In the Goods of Smith.* (2)

SIR J. P. WILDE. I think that the doctrine of incorporation does not apply to this case as the will does not in distinct terms refer to any document appointing executors as existing at the time of the execution, but I will consider the question.

Cur. adv. vult.

SIR J. P. WILDE. The question in this case is, whether, in accordance with the Wills Act, and Lord St. Leonards' Act, and the rules by which the Court is guided, the clause appointing executors can be admitted to probate. Since the motion was made, I have referred to the case of *In the Goods of Watkins* (3), in which an application was made for probate of some papers said to be referred

(1) 1 Vict. c. 26, s. 9; 15 Vict. c. 24, s. 1.
(2) 2 Curt, 796. (3) Ante, p. 19,

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IN THE GOODS OF DALLOW.

to in the will, by these words: "I do hereby bequeath the following sums to my sons and daughters hereunder named, and I declare the undermentioned sons and daughters to be my executors." The application was refused, and the Court said: "Before this motion can be granted two propositions must be established, neither of which can be established in this case. First, it must be made manifest that the testator in the executed paper referred to some papers then in existence; and next, that the papers in question are beyond all doubt the papers referred to." On consideration I think that is the true principle by which the Court ought to be guided, and which must be applied to this case. Now, although there is parol evidence that the clause following the signature was written before the execution, and was in existence at the time of the execution, it is not made manifest by any words in the will that the testator was describing that clause when he referred in the early part of it to "my executors hereinafter named," and the parol evidence cannot be received for that purpose. It seems to me, moreover, that it would be directly contrary to the statute, which requires a will to be signed at the foot or end thereof, to grant probate of this clause. And Lord St. Leonards' Act—which explains the construction to be put on the words "foot or end,"—expressly excepts anything written underneath the signature. I therefore think that I was right in the view I took when the motion was made, and probate must go without that clause.

Attorney: *C. J. Augier.*

1866
May 22.

IN THE GOODS OF CHOLWILL.

Limited Administration—Person entitled to Grant abroad—Immediate Grant necessary—20 & 21 Vict. c. 77, s. 73.

At the time of the death of an intestate his only next of kin was in New Zealand. The Court, upon being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a grant of administration to the sister of the intestate, under the 73rd section of the 20 & 21 Vict. c. 77, for the use and benefit of the next of kin, limited until such time as the grant should be made to the next of kin or his lawful attorney, and ordered the administratrix to give justifying security.

NICHOLAS CHOLWILL, late of Moorwinstow, in Cornwall, farmer, died at Moorwinstow, on the 21st March, 1866, intestate and a widower, leaving Laurence Hugh Cholwill, his son, and only next of kin, surviving him. L. H. Cholwill resides at Taranaki, in New Zealand. The intestate died possessed of a freehold farm at Moorwinstow, of the value of 1400*l.*, and household furniture, farming stock, growing crops, &c. &c., of the value of 200*l.* He had managed the farm up to the time of his death, and since his death it had been under the care of S. Waller, one of his servants. It was necessary that a representative of the deceased should be appointed without delay, for the purpose of carrying on the farming business, and of preserving the property, and Fanny Haynes, of Hartland, Devonshire, widow, the sister of the intestate, was willing to accept the grant of administration.

Dr. Spinks moved for the grant accordingly.

SIR J. P. WILDE said he thought the application a reasonable one under the circumstances, and made a grant of administration, under the 73rd section of the 20 & 21 Vict. c. 77, to Mrs. Haynes, for the use and benefit of L. H. Cholwill, limited unto such time as L. H. Cholwill, or his lawful attorney, should obtain administration—the administratrix to give justifying security.

Proctor: *E. W. Crosse.*

IN THE GOODS OF COOMBS. 1866 *May* 22.

Citation to take Administration—Creditor—Statute of Limitations.

A creditor was allowed to cite the next of kin to accept administration, or shew cause why it should not be granted to the applicant, although his right of action was barred by the Statute of Limitations.

JAMES COOMBS, late of Newington, in Surrey, died in April, 1857, intestate, leaving two sons, his only next of kin, surviving him. At the time of his death he was indebted to his brother, W. H. Coombs, in the sum of 400*l*. W. H. Coombs was desirous of obtaining possession of some securities of the value of 100*l*. belonging to the deceased, but the person who held them refused to deliver them except to the legal representative of the intestate. W. H. Coombs had applied at the principal registry for a citation calling upon the next of kin to take administration or to shew cause why it should not be granted to him as a creditor, but the application was refused on the ground that his right of action was barred by the Statute of Limitations.

Dr. Wambey moved for a citation. The statute merely bars the right of action, but the debt remains and the administrator would be entitled to retain it.

SIR J. P. WILDE. The application seems an equitable one. I will allow you to issue the citation.

Attorney: *Goldsmith.*

Admon subsequently granted to the creditor although his debt was barred by the Stat of Limits 3 & 4 Will. IV. c. 27. Post 208

1866
May 23.

IRELAND *v.* RENDALL.

Costs—Unsuccessful opposition to Will—Notice under Rule 41*—Plea of undue influence.*

The 41st Contentious Business Rule, which protects a person opposing a will against condemnation in costs, if he gives notice with his pleas that he merely insists upon the will being proved in solemn form, and only intends to cross-examine the witness produced in support of it, does not apply to a case in which undue influence, or any plea other than a traverse of the declaration, is pleaded.

The plaintiff propounded, as executor, the will of Mrs. Rendall, a married woman, executed under a power. The defendant was the husband of the deceased, and he pleaded in opposition to the will, undue execution, incapacity, and undue influence. He had given notice under Contentious Business Rule 41, that he only intended to cross-examine the witnesses produced in support of the will. The cause was heard without a jury, and the Court, after hearing the evidence produced by the plaintiff, pronounced for the will.

Dr. Deane, Q.C. (*Dowdeswell* with him), for the plaintiff, moved that the defendant might be condemned in costs.

Coleridge, Q.C. (*Dr. Spinks* with him), for the defendant. The notice protects him against condemnation in costs.

[Sir J. P. Wilde. The plea of undue influence is inconsistent with the notice, for the notice is that you merely insist on proof in solemn form, that is, proof of the due execution of the will, and of the testator's capacity. The plea of undue influence raises a third issue.]

The cross-examination of the plaintiff's witnesses might have established the plea of undue influence.

Sir J. P. Wilde. There was no reasonable ground for contesting the will. It was natural that the defendant should be dissatisfied and angry with it, but he was not justified in putting a plea of undue influence on the record. If he had merely put the plaintiff upon proof of the due execution of the will, and of the deceased's capacity, the notice would have protected him against condemnation in costs, but as he has pleaded undue influence, for which there was no pretence, he must pay the costs.

Attorney for plaintiff: *Robertson Buchanan.*

Attorneys for defendants: *Gregory & Rowcliffes.*

ZEALLEY *v.* VERYARD AND BRIDLE.

1866
June 12.

Jurisdiction of County Courts—Jurisdiction of the Probate Court—County Court Causes—New Trials—20 & 21 Vict. c. 77, ss. 54 to 59—21 & 22 Vict. c. 95, s. 10.

When a testamentary cause, in which a county court has jurisdiction, has been commenced in, or has been transferred to, a county court, the Court of Probate has no power to grant a new trial, or to make any order in the cause, unless it is brought before it by way of appeal from the determination of the judge of the county court in point of law, or upon the admission or rejection of evidence, under the 58th section of the 20 & 21 Vict. c. 77.

Post 605
2 P. & M. 18

THIS was a cause of proving in solemn form the will of James Veryard. It was propounded by the plaintiff, as sole executor, and was opposed by the defendants, the next of kin and the heir at law of the deceased. The pleas were—undue execution; incapacity; that the deceased did not know and approve of the contents; and undue influence. The suit was commenced in the Court of Probate, and after issue had been joined, was transferred by that court to a county court, under the 59th section of the 20 & 21 Vict. c. 77, upon an affidavit being filed by the plaintiff shewing that the deceased had, at the time of his death, his fixed place of abode in one of the districts specified in schedule A. to the Court of Probate Act, and that his personal estate was under the value of 200*l.*, and that, at the time of his death, he was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards. The cause was tried in the county court at Bridport, before the judge of that court, by a jury. The jury found that the will had been procured by the undue influence of the plaintiff, and the judge of the county court pronounced against the will. The registrar of the county court, in pursuance of the 55th section of the 20 & 21 Vict. c. 77, and the county court rules and orders of the 4th February, 1858, transmitted a certificate under seal of the decree which had been made to the district registrar of the Court of Probate.

On the 29th of May, 1866, a rule nisi for a new trial was granted by the Court of Probate, on the ground that the verdict on the issue of undue influence was against the weight of evidence.

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ZEALLEY v. VERYARD.

Searle, for the defendant, shewed cause against the rule. The Court has no power to grant a new trial in a cause in which the county court has jurisdiction, under s. 10 of 21 & 22 Vict. c. 95. (1) By s. 59 of the 20 & 21 Vict. c. 77, suits commenced in this court, in which a county court has jurisdiction, may be transferred to the county court, and it is enacted that the judge of the county court is to proceed therein as if the cause had arisen in his court in the first instance. Although the cause was commenced in the Court of Probate, the jurisdiction of the court ceased when it was transferred to the county court. The judge of the county court exercises the jurisdiction of the Court of Probate, and makes the decree in the cause, and the 55th section of the 20 & 21 Vict. c. 77, points out the mode in which the decree of the county court judge is to be certified to the district registrar, who is to act upon it as if it were a decree of the Court of Probate. The decision of the county court judge can only be reviewed by the Court of Probate by way of appeal upon a point of law, or upon the admission or rejection of evidence under the 58th section of the 20 & 21 Vict. c. 77. In some reported cases, orders appear to have been made by the Court of Probate in county court causes upon the assumption that the Court has the same jurisdiction in respect to them that it has in respect to cases in which issues of fact are sent for trial to a court of common law. But where issues of fact are sent to a common law court, the cause remains in the Court of Probate, whereas a cause in which a county court has jurisdiction is transferred to the county court. The Court has no power to send issues of fact for trial to a county court. He referred to county court rules and orders of the 4th February, 1858.

Dr. Spinks, in support of the rule. This Court has a general power in all testamentary causes to make any orders that may be necessary for the purpose of preventing a grant of probate or administration from issuing improperly, and it may order a question of fact to be re-investigated if it is satisfied that the justice of the case requires it. The practice has hitherto been to make the same orders in county court cases that are made in cases where

(1) This section is substituted for s. 54 of 20 & 21 Vict. c. 77, which is repealed by s. 11 of 21 & 22 Vict. c. 95.

issues of fact are sent to common law courts. He cited *Thomas* v. *Crowther*. (1)

SIR J. P. WILDE. It seems to have been taken for granted in some previous cases that the Court has the same powers in cases which are tried in the county courts, as in cases in which issues are tried in the common law courts, but, on examining the statute, it is plain that it has not. If the circumstances are such as to bring a cause within the jurisdiction of the county court, and it is commenced in or transferred to the county court, that court has seisin of it, and is empowered to make a decree in it, and the 55th section points out the machinery by which that decree is to be certified to the district registrar, who is thereupon to issue a grant of probate or administration. In cases within the jurisdiction of a county court, it is competent to the party applying for a grant, or for the revocation of a grant, to go at once to the county court, or if the suit has been commenced in this court, to apply under the 59th section to have the cause sent to the county court, and where "it is shewn to the Court of Probate that the state of the property and the place of the abode of the deceased were such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such county court, and the judge thereof shall proceed thereon as if such application and cause had been made to and arisen in his court in the first instance." And how is that? Why, by pronouncing a decree for the grant or revocation of probate or administration, a certificate of which is to be transmitted to the district registrar. It is said that this Court has power to inquire whether a verdict is against evidence, and to order a re-investigation of fact in a county court cause if it thinks fit. It would be a sufficient answer to that contention to say that the statute gives the county court jurisdiction in the cause for all purposes, but the 58th section prevents the possibility of doubt on the point, for it provides that "any party who shall be dissatisfied with the determination of the judge of the county court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this act, may appeal from the same to the

(1) 2 Sw. & Tr. 501.

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ZEALLEY v. VERYARD.

Court of Probate," a provision which would be unnecessary if this Court had seisin of such causes, and could grant new trials as in cases where an issue is directed to a common law court, and which, moreover, clearly indicates the intention of the legislature to give the county court exclusive jurisdiction as to questions of fact. On these grounds the rule must be discharged, but as it appears from the reported cases that there has hitherto been some confusion in the practice by which the parties have been misled, there will be no order as to costs.

Attorneys for plaintiff: *Dobinson & Geare.*
Proctors for defendants: *Shephard & Skipwith.*

June 26.

IN THE GOODS OF MARY SUNDERLAND, DECEASED.

Will—Lists in existence at time of execution of Will, but not so described in Will —Parol evidence—Incorporation.

PD 81

The testatrix by her will bequeathed the residue of her property, save and except such articles of "furniture, &c., as shall be ticketed or described in a paper in my own handwriting, to shew my intention regarding the same." When she instructed her attorney to draw the will, she produced to him two lists which she said was the paper she intended to refer to. At the time when the will was executed they were not shewn to the attesting witnesses, but at the time when a second codicil to the will was executed they were seen by the witnesses, but the testatrix did not make any verbal reference to them:—

Held, that, as the will did not describe the lists as then existing, parol evidence was inadmissible to prove that fact, and that the lists therefore must be excluded from probate.

THE deceased, Mary Sunderland, widow, died on the 7th of April, 1866, having duly executed a will, dated March 9, 1864, and two codicils thereto, dated respectively December 30, 1864, and January 6, 1866. The residuary clause in the will was as follows: "I give all the residue of my personal estate whatsoever and wheresoever (save and except such articles of furniture, pictures, plate, trinkets, linen, and wearing apparel, in my dwelling-house at the time of my decease, as shall be ticketed or may be described in a paper in my own handwriting, to shew my intention as regards the same, which intention I expect my executors to give effect to) unto the said H. Freeman, and T. F. Ormerod, &c., in trust, &c.

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The deceased left paper writings, marked D and E, purporting to contain gifts of her furniture in her dwelling-house, signed by her, but unattested, and in neither of them was there any reference to either her will or codicils. Mr. Chambers, the solicitor who prepared the will and codicils, deposed that he prepared the will from her instructions; that on the 26th of February, 1864, he attended on her with the draft of the will for her approval, when she informed him that she had expressed in writing the way in which the furniture and articles referred to in the said clause were to be disposed of, and then produced the papers D and E, and said they were the paper writings referred to in the draft of her will; but that at the time of the execution of the will, on March 9, 1864, the paper writings were not produced to or seen by the attesting witnesses; that on the execution of the codicil of December 30, 1864, the said paper writings were not referred to, or produced to the attesting witnesses by the deceased; but that on the 6th of January, 1866, the day of the execution of the second codicil, whilst his partner was copying out the second codicil for execution in another room, the deceased again produced to him the papers D and E, and again told him the same were the papers referred to in her will, and both the attesting witnesses deposed that at the time of the execution of the second codicil, the papers D and E were lying on a table in the room in which the deceased then was, and within her sight, though she did not, while executing the codicil, make any verbal reference to it.

May 12. *Dr. Spinks* moved that lists D and E should be included in the probate, on the ground that the reference to them in the will was sufficient to prove their identity, and that they were seen by the attesting witnesses at the time of the execution of the second codicil.

SIR J. P. WILDE. This case stood over to enable the Court to consider whether it would be justified in granting probate to two lists said to be incorporated in the will. It appears that at the time when the will was executed the two lists had already been written by the testatrix, and were in existence. If the Court were at liberty to turn to independent sources of information and investi-

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gate the question, whether she intended those papers to form part of her will, independently of the language in which she is supposed to have referred to them, there is abundant parol evidence to satisfy the Court that the testatrix did intend these lists to form part of her will. But after consideration, I am of opinion that the Court is not at liberty to enter into that question, and to receive that parol evidence. The Court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen* v. *Maddock*. (1) That limit seems to be fixed by one sentence in the judgment: "A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it." There must be a reference to a written document described as then existing. In *Von Straubenzee* v. *Monk* (2), Sir C. Cresswell said: "Such being the facts of the case, the judgment in *Allen* v. *Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon in *Smart* v. *Prujean* (3), that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing, in such terms that it may be ascertained."

On the authority of these cases, I hold that in order to let in parol evidence to ascertain the truth as far as it can be ascertained by such evidence, with regard to an unexecuted testamentary document, the passage in the will by which reference is made to it, must describe it as a document then existing. I think that these papers are not so described, and I therefore grant probate of the will and codicils alone.

Attorneys: *Torr, Janeway, & Tagart.*

(1) 11 Moo. P. C. at p. 454. (2) 3 Sw. & Tr. at p. 12,

(3) 6 Ves. 565.

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Republication of Will by Codicil—Reference in Will to unexecuted document—Incorporation. *July* 3.

The republication of a will by the execution of a codicil, will not of itself entitle an unexecuted paper, written or signed between the date of the will and the date of the codicil, to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil.

THE Dowager Lady Truro died on the 21st of May, 1866, leaving a will dated the 15th of September, 1865, and a codicil dated the 10th of October, 1865. The will contained the following clause: "I likewise bequeath to the present Baron Truro, in affectionate recollection of his kindness to me, all my library and books and maps, except such parts thereof as I shall herein or after or by codicil otherwise dispose of; and also all my engravings, paintings, pictures, and drawings, save and except such parts thereof as I shall herein or after or by codicil otherwise dispose of; also all my household bed and table linen, and also all such articles of silver plate and plated articles *as are contained in the inventory signed by me and deposited herewith.*"

The will was deposited by the deceased at Messrs. Coutts', the bankers, in an envelope with an endorsement in her writing, and in the same envelope with the will was found an inner envelope containing a list of plate. The list, which was in several sheets, was headed "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. Augusta E. Truro." The list was signed by the deceased in several places, and on the last sheet was her signature and the date, 21st of September, 1865. Affidavits were filed shewing that the will and the list were deposited with Messrs. Coutts on the 21st of September, 1865, and that the codicil was deposited at a subsequent date. One of the affidavits also proved that when the will was executed the attention of the testatrix was called to the importance of signing the inventory and depositing it with her will, and that she intimated her intention of acting upon that suggestion.

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The Queen's Advocate and *Dr. Spinks* moved for probate of the will of the 15th of September, 1865, the list of plate dated the 21st of September, 1865, and the codicil of the 10th of October, 1865. The inference to be drawn from the affidavits is that the list was in existence at the time when the will was executed, and the date of the 21st of September was added subsequently when it was deposited at the bankers. If the list was in existence when the will was executed, it is within the rule laid down in *Allen* v. *Maddock* (1), and it is entitled to probate. The will distinctly refers to the list as an existing document, and the date upon the list refers to the deposit.

SIR J. P. WILDE. I have very serious doubts whether I could allow this list to form part of the probate if the question depended upon the words of the will, because, although to some extent they point to an existing document, I should, construing them by the existing facts, read them as meaning, not that the document had been signed at the time when the will was executed, and would be deposited with it, but as meaning that it would be signed and deposited when the will should be deposited. There is no distinct reference to an existing document. For, though the testatrix, in using the words, "signed by me, and deposited herewith," would primâ facie seem to mean "now already signed and deposited," yet those words, like all others in a written document, must be construed in connection with the existing and surrounding state of things. Now, the will could not have been deposited at the time at which the testatrix was speaking, and the list when produced was plainly not signed till the 21st of September. The true meaning, therefore, of the words, as spoken at that date, would seem to be, "a list which I intend to sign and deposit," &c. It is, however, unnecessary to decide whether the list is incorporated with the will, because I am of opinion that it is entitled to probate by force of the codicil.

This makes it material to look into the decisions on the subject. The general rule as to the consequences of republication is thus laid down by a most careful and learned text writer: "It has long been settled law that the republication of a will is tanta-

(1) 11 Moo. P. C. 427.

mount to the making of that will de novo; it brings down the will to the date of the republishing and makes it *speak*, as it were, *at that time*. In short, the will so republished is a new will." (1)

He then goes on to refer to numerous cases which have been decided in accordance with this principle, and amongst others to *Skinner* v. *Ogle* (2), where it was held that "a codicil duly executed will give effect and operation to a will altered after the passing of the act, although the alteration was not duly attested, and though the will itself was executed before 1838," and to *In the Goods of Hunt* (3) where Sir John Dodson held that a codicil duly executed will give effect to unexecuted papers which have been written between the periods of the execution of the will and the codicil, although the latter does not refer to the former.

The question came before Sir C. Cresswell in March, 1863, *In the Goods of Stewart* (4), and in June, 1863, *In the Goods of Matthias.* (5) In the first case the will contained this clause: "I direct my executors to distribute all pictures, books, and other articles according to any list or lists signed by me." A paper was found without any date, but which was executed before a second codicil, headed "List referred to in my will and codicil." The second codicil commenced "This is a codicil to the last will and testament of me . . . I hereby confirm my last will with all the codicils thereto duly signed by me." "Held that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil was entitled to be admitted to probate as a portion of the will confirmed by the codicil."

In the second case the testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853 and another in 1862. On her death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will," were found folded together in a locked portfolio. There was no evidence to shew that the memorandum was in existence when the will was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil,

(1) Williams on Executors, Part i. b. ii. s. 2, p. 188, 5th ed.

(2) 4 N. of C. at p. 79.

(3) 2 Robert, 622, 17 Jur. 720, 25 L.J. (P.M. & A.) 47

(4) 3 Sw. & Tr. 192, 9 Jur. N.S. 630

(5) 3 Sw. & Tr. 100, 9 Jur. N.S. 630

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but the last codicil did not refer to it. It was held "that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate." The learned judge is reported to have said: "Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to shew that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of the will which was no part of the will before, and the codicil contains no reference to the memorandum?" And accordingly probate of the memorandum was refused. Now there is no doubt that probate could not have been granted of that memorandum, because, treating the will as having been re-executed as the date of the second codicil, the reference was not sufficient to incorporate it according to the rule laid down in *Allen* v. *Maddock*. (1) But if the language of the learned judge was intended to have a universal application, if it is to be taken as laying down a general rule that by the kind of re-execution of a will which is involved in the execution of a codicil nothing can be inferentially added to a will which it did not contain before, it is at variance with the decision of the same learned judge in *In the Goods of Wyatt*. (2) In that case a testator executed a draft will in April, 1847, and an engrossed will in May, 1847. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and in pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink but not as altered in pencil. Probate was decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil. If the proposition laid down by the learned judge in *In the Goods of Matthias* (3) is a general one, that decision cannot be supported. I think that the proposition

(1) 11 Moo. P. C. 427. (2) 2 Sw. & Tr. 495. (3) 3 Sw. & Tr. 100.

is not a general one, but must be read in reference to the case to which it refers.

After considering these cases I have come to the following conclusion as to the rule by which the Court should in future be guided in dealing with the republication of a will by a subsequent codicil.

It is plain on the one hand that the republication of the will, which is involved in the execution of a codicil, may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. The case just quoted, *In the Goods of Wyatt* (1), in which the codicil was held to give effect to alterations made in the will after its execution, is a direct authority for this proposition. On the other hand it is plain that there must be a very distinct limit to the action of the Court in this direction. For the tendency of such a doctrine, if not restrained, would be to place unexecuted papers on the same footing with those which have received due execution, merely because they were in existence at the subsequent date of the execution of a codicil. The Court cannot, according to the authorities, give greater or less effect to a codicil than this:—to treat its execution as if the testator had at the same time sat down and re-executed his will. Looked at in that light, the following rule would appear to be the consequence: Where the will, if treated as executed on the date of the codicil, and read as speaking at that date, contains language which, within the principle of *Allen* v. *Maddock* (2), would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

Applying that doctrine to the present case, and treating this will as having been re-executed on the date of the codicil, its language runs thus: "And also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." Now, construing these words by the light of

(1) 2 Sw. & Tr. 494. (2) 11 Moo. P. C. 427.

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the events which had then happened, they appear with sufficient distinctness to refer to a document then existing. For the inventory referred to had then been signed by the testatrix and deposited at the bankers. The operation of the codicil as a re-execution of the will, therefore gets rid of all difficulty, and I admit the will and the codicil to probate, together with the inventory signed by the testatrix.

Attorneys: *Wilde, Rees, Humphreys, & Wilde.*

July 17.

IN THE GOODS OF POOL.

Will executed in blank—Doubtful disposition of Residue—Administration with Will annexed to Widow.

Although it is the practice to grant administration with the will annexed to a residuary legatee in preference to the widow, the Court will not pass by the widow unless it is clear that the residue is left to some other person.

A testator duly executed a will whereby he gave all his property to trustees upon trust, to invest part of it in an annuity for his widow, and to divide the residue amongst his children, but the amount of the annuity and the names of the trustees and executors were left in blank. The Court granted administration with the will annexed to the widow.

JOHN STEAD POOL, late of Kingston-upon-Hull, died on the 27th of March, 1866, leaving a widow and five children surviving him. In 1864, his solicitor, Mr. Chapman, had drawn up a will from his instructions, leaving blanks for the names of the trustees and executors, for the amount of an annuity to be given to his widow, and for the date of the execution. This incomplete will remained in his custody until his last illness, when he was urged to complete it, but he refused to do so until a valuation had been made of his property. He consented, however, to sign it in its incomplete state, and on the 8th of March, 1866, it was duly executed. It remained in the same state until his death. No other will was in existence.

The will began by directing the payment of debts and funeral and testamentary expenses by the testator's executors "hereinafter named," and continued as follows: "I give, devise, and bequeath all my real and personal estate, wheresoever situate, unto

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of the borough of Kingston-upon-Hull aforesaid, and of the same place, their heirs, executors, and administrators, upon trust, to permit my dear wife to reside in such one of my houses as she shall think proper during her life, if she shall so long continue my widow, and also to retain for her use during the same period the household furniture, plate, and linen of which I may at the time of my decease be possessed," and upon further trust to collect debts, and to dispose of his stock-in-trade and business, and invest the proceeds. "And upon further trust as to my said real and personal estate to pay out of the rents, interest, dividends, and produce thereof to my said wife the sum of per annum in equal quarterly payments during widowhood for her own maintenance and that of my said children. And I hereby authorize my said trustees, out of the accumulation of the rent, interest, dividends, and produce aforesaid, to advance and apply from time to time such sums as they may deem necessary for the education and advancement of any of my children, either by payment of schooling or premiums of apprenticeship. And upon further trust, upon the attainment by my youngest child of his or her age of twenty-one years, to sell and dispose of my said estate, either by public auction or private contract, and to convert into money my said personalty, and thereupon to re-invest such portion of my said estate as may be sufficient to secure to my said wife her said annuity of , and to divide the remainder equally between and amongst such of my said children as shall then be living. And my will is, and I further direct, that my said trustees shall, upon the decease or second marriage of my said wife, convert into money that portion of my said estate as shall then be invested, and divide and pay the produce thereof equally between and amongst such of my said children as shall attain or shall have attained their respective ages of twenty-one years as aforesaid. * * * And I hereby constitute and appoint the said and the executors of this my will. In witness, &c."

Dr. Deane, Q.C., moved for a grant of administration with the will annexed to Anna Maria Pool, the widow of the deceased.

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Whatever may be the effect of the paper it is duly executed and it is valid as a will according to the doctrine laid down in *Lister* v. *Smith*. (1) The widow is the only person to whom any part of the property is actually bequeathed, for the use of a house and furniture is given to her for life. The residue is uncertain as it depends upon the amount of the annuity given to the widow which is left in blank: *Attorney General* v. *Hinxman*. (2)

[SIR J. P. WILDE. A doubt has been suggested in some cases whether the practice of the Court in granting administration with the will annexed to the persons interested in the residue instead of to the widow is correct, but certainly the Court ought not to pass by the widow, unless it sees very clearly that the residue is given to some other person. The Court should avoid as far as possible dealing with a question of construction which is afterwards to be decided by another Court, not a court of appeal.]

If the Court were to hold that the paper is not testamentary, the widow would be entitled to the grant.

SIR J. P. WILDE. It is clear that I cannot say upon the affidavits which have been filed that this paper is no will. No doubt papers which are not executed animo testandi are not entitled to probate, although they may be testamentary on the face of them, but when such a paper is before the Court it is extremely reluctant to refuse probate of it, and will not take that course without very strong evidence that it was not executed animo testandi.

This, then, being a will, the next question is, who is entitled to the grant of administration. Under the statute the widow is primarily entitled, but according to the practice of the Court the grant would be made to the residuary legatee as the person with the beneficial interest, passing by the widow. I do not wish to suggest any opinion one way or the other upon the question whether there is a residue, as that is a question for the court of construction. It is sufficient for me to say that as I do not see clearly that the residue is left to some person other than the widow I shall not pass her by. Administration with the will annexed will therefore be granted to the widow.

Proctors: *Dyke & Stokes.*

(1) 3 Sw. & Tr. 282; 33 L. J. (P. M. & A.) 29. (2) 2 Jac. & W. 270.

HUNT AND OTHERS *v.* HUNT.

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July 17.

Will—Due execution—Blank space preceding signature—"Foot or end"—Lord St. Leonards' Act, 15 & 16 *Vict. c.* 24, *s.* 1.

A will ended in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation clause and the signatures being written on the top of the fourth page:—

Held, that it was duly executed.

ANN BELL, widow, died on the 24th June, 1866, leaving a will dated the 4th September, 1860. It was written on the first, second, and third pages of a sheet of foolscap paper, and the last clause appointing executors ended in the middle of the third page, the remainder of the page being left blank. The attestation clause and the signatures were written at the top of the fourth page. The deceased had signed her name at the bottom of the first and second pages, but not on the third page. A caveat had been entered by one of the next of kin.

Dr. Spinks, for the executors, moved for an order to discontinue contentious proceedings, and for a grant of probate. The case is clearly within Lord St. Leonards' Act, 15 & 16 Vict. c. 24, s. 1.

Dr. Wambey, for the next of kin, consented.

The Court granted the motion.

Attorneys for executors: *F. & T. Smith.*
Attorneys for next of kin: *Griffiths & Smith.*

POWELL *v.* POWELL—POWELL INTERVENING.

July 24.

Will—Dependent Relative Revocation—Destruction of a later Will with an intention to revive an earlier one.

A testator executed a will in 1864 revoking all former wills. In 1865 he destroyed this will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand.

The Court, overruling a dictum in *Dickinson* v. *Swatman* (30 L. J. (P. M. &

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A.) *Held*, that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, there was no revocation.

WALTER POWELL, late of No. 30, Park Walk, Chelsea, the deceased in this case, died on the 18th of June, 1865. He executed a will on the 3rd of March, 1862, by which he left all his property to his grandson, Edward Burfoot Powell, the plaintiff, whom he appointed his executor, and another will on the 29th of March, 1864, by which he revoked all former wills, and bequeathed all his property to his nephew Walter Powell, whom he appointed his executor. This latter will he destroyed in the early part of the year 1865, and under the circumstances connected with its destruction there arose a question on the doctrine of dependent relative revocations.

The plaintiff propounded the will of March 3, 1862. The defendant, who appeared to establish an intestacy as a granddaughter and one of the next of kin of the deceased, pleaded first, a traverse of due execution of will propounded; secondly, that subsequently to its execution, the deceased made and duly executed, according to 1 Vict. c. 26, a will dated the 29th of March, 1864, at a time when he was of sound mind, memory, and understanding, by which the will of March 3, 1862, was duly revoked. (1) Issue joined.

April 20. *Bayford* appeared for the plaintiff.

Dr. Tristram for the defendant.

Evidence was given of the due execution of the first will. Evidence was also given of the due execution of the second will, and upon proof of its destruction by the testator, the draft was received as evidence of its contents. Mrs. Elizabeth Willis, who was present at its destruction, deposed, that early in 1865, the testator, whose housekeeper she was, seemed disturbed in his mind, and on her inquiring the cause, he said he was not easy in his mind about the last will he had made, leaving his property to his nephew, Mr. Walter Powell; that one day he got out two or three wills, and asked her to read them to him, and as she could not read very well, he called in the charwoman, who read the wills of 1862 and 1864 to him; that he then placed the will of 1862 under his arm, and said that was the will he intended to stand, and he tore the will of

(1) See ante, p. 6.

1864, which was, by his request, put into the fire and burnt in his presence.

[SIR J. P. WILDE. Upon the evidence of this last witness a curious question arises, namely, whether there has not been a dependent relative revocation, and Mr. Walter Powell, as the executor of the will of 1864, ought to have an opportunity of raising the point.]

By arrangement between the parties, Mr. Walter Powell intervened and propounded the will of 1864.

June 26. *Bayford* now appeared for the intervener. This is a case of dependent relative revocation. It is a conditional revocation, and the Court will be carrying out the testator's intention by giving effect to the condition. The testator's intention was to set up the first will by the destruction of the second will; and as the destruction of the second will did not give effect to that intention, it did not work a revocation. He cited *Ex parte Earl of Ilchester* (1); *Perrott* v. *Perrott* (2); *Major* v. *Williams* (3); *Hale* v. *Tokelove* (4); *Newton* v. *Newton* (5); *Rogers* v. *Goodenough* (6); *Dickinson* v. *Swatman*. (7)

Dr. Tristram, contrà. 1. The foundation of the doctrine of dependent relative revocation is a desire to carry out the intention of the testator: *Lord Thynne* v. *Stanhope*. (8) The deceased did not desire that his nephew (the intervener) should have his property, which would be the legal result if the Court pronounced for the will of 1864. An intestacy would more nearly carry out his intention. 2. If the contention for the intervener is to prevail, this doctrine will be pressed further than it ever has been before: *Dickinson* v. *Swatman*. (7) In all the previous cases the destruction of an existing will has been accompanied by another act, viz. the informal execution of the instrument intended in substitution. Here the destruction of the existing will was only accompanied by a declaration in reference to a will executed long before. 3. If the circumstances proved to have taken place in this case had occurred

(1) 7 Ves. 348, 372, and 379.
(2) 14 East, 423.
(3) 3 Curt. 432.
(4) 2 Roberts, 318.
(5) 12 Ir. Ch. Rep. App. 1; 13 Ir. Ch. Rep. 245.
(6) 2 Swab. & Tris. 342, 6 Jur. N.S. 391
(7) 30 L. J. (P. M. & A.) 84; 6 Jur. N.S. 832.
(8) 1 Add. 52.

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prior to 1 Vict. c. 26 coming into operation, the earlier will would have been entitled to probate in regard to personalty as having been republished: 1 Williams on Executors (1); and it would also have been valid to pass real estate for the reasons stated in *Goodwright* v. *Glazier*. (2) Surely it is not competent to the Court to say, as probate can no longer, as formerly, be granted to the will of 1862, which would give full effect to the testator's intentions, in consequence of the legislature having enacted (3) that a will once revoked shall not be republished by parol acts or declarations, that the plaintiff may, therefore, pray in aid the doctrine of dependent relative revocation, and take probate of the will of 1864.

Cur. adv. vult.

SIR J. P. WILDE. The testator in this case made a will on the 3rd of March, 1862, and a second will, revoking the first, on the 29th of March, 1864. In 1865 he destroyed the will of 1864, and the question is, whether, by that act of destruction, the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862. It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done "animo revocandi," it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the "animus revocandi" had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argu-

(1) 5th ed. at p. 178. (2) 4 Burr. 2512. (3) 1 Vict. c. 26, s. 22.

ment. But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it;" or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" In either case, the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the "animus revocandi" present. It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration. The only case cited that requires special mention is that of *Dickinson* v. *Swatman*. (1) But Sir C. Cresswell, in that case, does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said, "At all events, to make it a case of dependent relative revocation, you would have to shew that he did not intend to revoke the second will unless by doing so the first would have been revived."

The Court pronounces, therefore, for the will of the 29th of March, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it.

The costs of all parties out of estate.

Attorneys for plaintiffs, interveners: *Hume & Bird.*

Attorney for defendant: *Wm. Day.*

(1) 30 L. J. (P. M. & A.) 84; 6 Jur. N. S. 852.

1866
July 24.

IN THE GOODS OF MORGAN.

Testamentary Deeds of Gift.

A deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until after his decease. Probate was granted of the three deeds, as together containing the will of the deceased, to the trustees, as legatees in trust.

SAMUEL MORGAN died on the 10th April, 1866, a widower, leaving three children, minors, surviving him. On the 12th February, 1866, he executed, in the presence of two witnesses, three deeds of gift in favour of his three children respectively. By these deeds he conveyed his property to trustees for the benefit of his children, but all of them contained clauses directing that the conveyances were not to take effect until after his decease. The property remained in his possession until his decease.

Dr. Swabey moved for probate of the three deeds as together containing the last will of the deceased, to the trustees as executors according to the tenor, or as legatees in trust. Although in form they are deeds of gift, they are in substance testamentary, as nothing could pass under them until after the death. He cited Williams on Executors, Pt. 1, bk. ii. c. 2, s. 3 (p. 89 of 5th ed.): *Habergham* v. *Vincent*. (1)

SIR J. P. WILDE. In *Masterman* v. *Maberley* (2), Sir J. Nicholl lays down the principle applicable to these cases in very clear and general terms, to the same effect as Mr. Justice Williams. These three deeds of gift were intended to operate after the death and not until then, and they fall within that principle. On the authority of *In the Goods of Jones* (3), I cannot look upon the trustees as executors according to the tenor, but I grant probate of the three papers to them as legatees in trust.

Attorneys: *Jones & Starling.*

(1) 2 Ves. at p. 231. (2) 2 Hagg. Ecc. at p. 247.
(3) 2 Sw. & Tr. 155; 31 L. J. (P. M. & A.) 199.

CLINTON *v.* CLINTON.

1866
March 13.

Sequestration—Permanent Alimony—Rent-Charge.

The Court had made an order on the respondent for payment of permanent alimony at the rate of 110*l.* per annum, so long as he was in receipt of a rent-charge of 400*l.* per annum (his only source of income), the trustees of which had a discretionary power to refuse payment, in which event it enured to the benefit of the tenant for life. The respondent had prior to the date of the order become a bankrupt, but the trustees had nevertheless continued to pay to him the rent-charge, and he had failed to comply with the order of the Court.

The Court (the respondent and trustees opposing) directed a sequestration in general terms to issue against the property, &c., of the respondent.

Port 367,
2 P. Wms. 55

In this suit the Court had pronounced a decree for judicial separation on the ground of the adultery of the respondent Lord Thomas C. P. Clinton, and on the 25th of January, 1865, made an order for permanent alimony in the following terms: "That the respondent do out of his present income, and until further order of this Court, pay or cause to be paid to the petitioner, or S. and R. her solicitors, for her use, on their being authorized by writing under her hand, permanent alimony at the rate of 110*l.* per annum, to be payable quarterly, such payments to continue until the respondent satisfies the Court that payment to him of the rent-charge of 400*l.* per annum under the second codicil to the will of Henry Pelham Duke of Newcastle, deceased, has ceased." The terms of the gift of the rent-charge were as follow:

"And I also give and bequeath unto Frederic Ouvry, Esq., and William James Farrer, Esq., their executors, administrators, and assigns, the yearly sum or rent-charge of 400*l.* during the life of my brother Lord Thomas Charles Pelham Clinton, to be paid by equal quarterly payments, but without a proportionate part thereof in case of his death on any other day than one of the said quarterly days of payment, the first quarterly payment thereof to be made at the expiration of three calendar months next after my decease. And I declare that the said F. O. and W. J. F., and the survivor of them, and the executors and administrators of such survivor, and their and his assigns, do and shall stand possessed of and interested in the said last-mentioned yearly sum or rent-charge of 400*l.* in trust, to pay and apply at such time or times and in such

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manner as they or he in their or his absolute and irresponsible discretion shall deem proper, and so as not to impose on them or him at law or in equity any trust or obligation with reference to the exercise of such discretion, the whole or such part or parts as they or he shall think fit of the said last-mentioned yearly sum or rent-charge of 400*l.* to or for the personal use, support, or benefit of my said brother Lord T. C. P. Clinton. And I direct that the said trustees or trustee for the time being do and shall (but subject and without prejudice to the continued rights of exercising the aforesaid discretionary power of payment and application) stand possessed of the said last-mentioned yearly sum or rent-charge of 400*l.*, or such part thereof as shall not be disposed of under the aforesaid power of payment and application, in trust for the person or persons who shall for the time being be entitled to the actual possession, or to the receipt of the rents and profits of the manors, hereditaments, and real estate hereby charged with the payments thereof."

Dr. Tristram, for the petitioner, moved for a sequestration to issue against all moneys in the hands and to come to the hands of Messrs. Ouvry and Farrer, as trustees of the rent-charge given to the respondent by the second codicil to the will of the late Duke of Newcastle.

[THE JUDGE ORDINARY. The practice of the Court hitherto has been to grant a sequestration in general terms against all the goods and chattels of the party in contempt.]

The application to attach this particular fund may be premature; but, after granting a sequestration in general terms, the Court might, following the practice of the Court of Chancery, make a supplemental order upon the trustees for payment of the rent-charge to the sequestrator, until the claim is satisfied: *Wilson* v. *Metcalfe* (1); *Johnson* v. *Chippendale.* (2)

Dr. Spinks, for the respondent, opposed the application, and suggested that the trustees of the rent-charge should have an opportunity of appearing.

[THE JUDGE ORDINARY. It appears to me that a sequestration ought to go in general terms. But in case Messrs. Ouvry and Farrer

(1) 1 Beav. 263. (2) 2 Sim. 55.

desire to be heard, I will grant a rule nisi, to be served upon them, and they can shew cause against its being made absolute.]

An affidavit was filed by Mr. Ouvry, stating that, previous to the order for permanent alimony, the respondent had become a bankrupt; that he and his co-trustee had been served with a notice from the official assignee that he claimed all the interest of the respondent in the rent-charge; and that since the 27th of June, 1865, he and his co-trustee had paid to the respondent sums amounting to 163*l.* 1*s.* 6*d.*

March 13. *Dr. Swabey* shewed cause for Messrs. Ouvry and Farrer. The trustees hold any part of this rent-charge, which they do not think fit to pay to the respondent, in trust for the person entitled to the rents of the estate on which it is charged. The respondent's assignee in bankruptcy is entitled to it, if the respondent or the tenant for life of the estate is not.

[THE JUDGE ORDINARY. Are Lord T. Clinton and Mr. Ouvry prepared to make any allowance to Lady T. Clinton? From whatever source the 400*l.* a year is derived, the obligation to support his wife is undoubtedly a primary obligation, and part of it ought to be allowed to her. I understood that 50*l.* a year was forthcoming for her.]

Dr. Swabey. The trustees have made no such arrangement.

Dr. Tristram. They admit that they are paying him the 400*l.*, and the order of the Court for the payment of the 110*l.* has not been obeyed.

[THE JUDGE ORDINARY. The writ must go, and you must make what use you can of it.]

Dr. Swabey. The trustees appeared to shew cause out of respect for the order of the Court.

THE JUDGE ORDINARY. The trustees have done quite right in throwing what light they could on the matter. I do not decide whether the sequestration will or will not touch this fund. The petitioner may have that or any other writ which will assist her in obtaining a reasonable proportion of the husband's income. Some one must be named sequestrator.

Solicitors for petitioner: *Shaen & Roscoe.*

1866
April 17.

COOMBS *v.* COOMBS.

Alimony pendente lite—Fund in the Wife's possession.

Where the husband's income did not exceed 60*l.* a year, and the wife had a sum of 70*l.* in her possession at the commencement of the suit, the Court refused to make an allotment of alimony pendente lite.

This was an application for an order for alimony pendente lite, upon the husband's answer, in a suit by a wife for judicial separation. The husband alleged that his net annual income derived from his business as a baker, as well as from every other source, did not amount to 60*l.* a year; and that upon his marriage with the petitioner he received with her a sum of above 65*l.*, and shortly before the commencement of the suit he handed over to her, and she had ever since held the possession of, the sum of 70*l.* in lieu thereof. The petition was filed on the 27th March, 1865.

Dr. Swabey moved for alimony pendente lite.
Dr. Spinks opposed the motion.

The Judge Ordinary. Alimony pendente lite is an ad interim arrangement. It is payable pending the litigation which is to determine whether or not the wife was right in withdrawing from her husband. Its payment is therefore enforced on the ground of necessity only, the supposition on which it is founded being that the wife has no other means of support, and that unless the husband is ordered to give up a fair proportion of his income to her, she will be without the means of subsistence. In this case it appears that there is a fund in the wife's hands from which she can be alimented pending suit. If it should turn out that she is in the right, the sum she may expend on account of her sustenance during the suit ought to be taken into consideration in allotting permanent alimony; but if it should turn out that she is in the wrong, she will have no claim against her husband. It seems to me that I ought not now to make any order for alimony, considering that she has this sum in her possession, and that the Court has means of recti-

fying the matter at the end of the suit if she should turn out to be in the right. 1866

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Attorney for petitioner: *J. P. Franklin.*
Attorney for respondent: *H. A. Reed.*

HUGHES *v.* HUGHES. *April* 17.

Pleading—Adultery and Cruelty—Answer—Misconduct of Petitioner.

In answer to a petition by a wife, charging adultery and cruelty, the respondent denied both those charges, and further alleged that the petitioner had habitually treated him with insolence and neglect, and frequently absented herself from home, and refused to inform him where she had been, and constantly set his orders and wishes at defiance; and that she had withdrawn herself from cohabitation for two years without reasonable cause. The Court refused to order those allegations to be struck out, being of opinion that the respondent was entitled to give evidence of them, for the purpose of shewing that his misconduct, if any, had been caused by that of the respondent.

THIS was a petition by a wife for dissolution of marriage. The petitioner charged divers acts of cruelty in March, 1853; in May and August, 1854; on Good Friday, 1856; in December, 1858; and in September, 1861; and adultery in 1863 and between February, 1863, and February, 1866. The respondent, in his answer, pleaded:—1, a traverse of the cruelty; 2, a traverse of the adultery; 3, condonation of the cruelty; 4, condonation of the adultery; and further alleged—5, that the petitioner, at their several residences in the said petition mentioned, habitually treated the respondent with insolence and neglect: that the petitioner frequently absented herself from home, and refused to inform the respondent where she had been, and that she constantly set his orders and wishes at defiance; 6, that in the month of September, 1854, the petitioner, without reasonable cause, left the house of respondent, and withdrew herself from cohabitation with him during the space of two years then next following; 7, that in the month of November, 1857, the petitioner came back entirely of her own accord to the house of the respondent, and cohabited with him there for several days: that she continued her cohabi-

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tation with the respondent at the "Angel" public-house, and also at the "York Arms" public-house, in High Holborn, London, until the month of October, 1859, occasionally absenting herself therefrom; 8, that on various occasions in the year 1860, at the "White Horse," in Rupert Street, in the city of Westminster, and at 14, Church Street, Hackney, in the county of Middlesex, the respondent and petitioner lived and cohabited as man and wife, the petitioner occasionally absenting herself from the "White Horse."

Pritchard, for the petitioner, moved that the 5th, 6th, 7th, and 8th paragraphs of the answer might be struck out.

Searle, for the respondent, contrà.

THE JUDGE ORDINARY. The allegations in the 5th and 6th paragraphs are material, as if proved, they may shew that the misconduct of the petitioner provoked the violence of the respondent, or may raise the question whether she has conduced to his adultery. Those paragraphs must, therefore, remain. The 7th and 8th paragraphs merely set out in detail the facts upon which the respondent relies to prove the plea of condonation, and are unnecessary. They must be struck out.

Proctor for petitioner: *Pritchard & Sons.*

Proctor for respondent: *Johnson & Coote.*

MALLINSON *v.* MALLINSON.

1866
June 5.

Custody of Children between the ages of 14 *and* 16—*Jurisdiction of Court.*

The Court has jurisdiction by its order to regulate the custody of children, until they attain the age of 16 years.

6 Ch 703.
7 Ch 516.
8 QB 159.
24 LD 32

THE Court pronounced a decree on the 1st of February, 1866, for a judicial separation in favour of Emma Mallinson, by reason of her husband's desertion, and further ordered that she should have the custody of such of the children of the marriage as were under the age of fourteen years for one month from that date. Subsequently the wife filed a petition praying the Court to entrust her with the custody of such of her children as by law it could, she having sufficient means to support them. Two of them were between the age of fourteen and sixteen, and one under the age of fourteen.

May 29. *Dr. Swabey* moved for an order that Mrs. Mallinson should have the custody of the three children who were under sixteen years of age. As regards the two who were between the age of fourteen and sixteen, he cited *Reg.* v. *Howes* (1), in which it was held that the father has a right to claim by legal process the custody of his children until the age of sixteen. The authority of this court is co-extensive with the rights of the father.

June 5. THE JUDGE ORDINARY. This case stood over that I might consider the decision in *Reg.* v. *Howes* (1) in the Queen's Bench. Up to the present time no order has been made by this Court as to the custody of a child above the age of fourteen years; but the result of the decision in *Reg.* v. *Howes* (1) was, that the judges held that they might safely take the age of sixteen as a limit within which they would interfere to control the freedom of a minor. I think this Court ought to follow that decision, and I will make an order for the petitioner to have the custody of her children until they respectively attain the age of sixteen.

Solicitors for petitioner: *Layton & Jaques.*

(1) 30 L. J. (M. C.) 47; 7 Jur NS 22

1866
June 6.

LLOYD *v.* LLOYD.

Identity of Wife—Confrontation—Divorce Act, 20 & 21 *Vict. c.* 85, *s.* 43.

Where it was necessary for the witnesses of a husband to be confronted with the wife (the petitioner) to enable him to establish his defence, and the husband was unable to ascertain her address, the Court ordered the wife to supply to him her address within three days, or to attend at the hearing.

The wife petitioned for a dissolution of marriage. The husband recriminated her adultery. The wife was in receipt of alimony, and her costs up to the hearing had been paid by the husband.

The respondent had filed an affidavit stating that upon inquiries he had ascertained that the petitioner's address as given in her affidavit filed with her petition was a false one; that notwithstanding he had made numerous inquiries, he had been unable to ascertain where she was living, and that it was necessary his witnesses should see and identify her to enable him to establish her adultery.

Dr. Deane, Q.C. (*Dr. Tristram* with him), moved under s. 43 of the Divorce Act (20 & 21 Vict. c. 85) for an order for the petitioner to attend at the hearing for purpose of her identification.

Dr. Spinks for the petitioner.

The Judge Ordinary. I will not allow a wife to make use of the process of this court, and at the same time to be refusing her address to her husband, thereby depriving him of an opportunity of establishing his defence. The order is, that her address be supplied to the respondent within three days, or that she attend at the hearing.

Solicitors for petitioner: *Swann & Tweed.*
Solicitor for respondent: *W. W. Comins.*

PAGANI *v.* PAGANI AND VINING.

1866
June 26.

Petition for Dissolution—Plea—Invalidity of Marriage—Demurrer—Appeal.

A demurrer to part of an answer to a petition for dissolution of marriage which put in issue the validity of the marriage, the other parts of the answer remaining to be determined, is not a final but an interlocutory matter, and one which under the first Divorce Act fell within the cognizance of the Judge Ordinary sitting alone, and his judgment on such demurrer is the subject of appeal to the full Court and not to the House of Lords.

Where the judgment on a demurrer from the state of the pleadings decides the whole suit, the appeal lies direct to the House of Lords.

HENRY PAGANI filed a petition for the dissolution of his marriage by reason of his wife's adultery, and prayed damages against the co-respondent.

The respondent and co-respondent filed answers, denying the validity of the marriage on the ground that the petitioner had, prior to his pretended marriage with the respondent, cohabited with her sister, and denied the adultery, &c. The petitioner demurred to the paragraphs in the answers alleging the invalidity of the marriage. Joinder in demurrer.

On the 12th of December, 1865, the petitioner applied for directions as to the mode of trial, when the Judge Ordinary directed the cause to be tried before himself; and having signified his readiness to give judgment on the question raised by the demurrer at once with the consent of parties, he stated that he felt himself bound to follow the decision of the full Court in *Wing* v. *Taylor* (1), in which the same point was raised, and pronounced for the demurrer. On the 16th of January, 1866, the Court further ordered the questions of fact to be tried before a special jury. On the 15th of February, the co-respondent, Mr. Vining, presented a petition to the House of Lords, appealing against the judgment of the Judge Ordinary on the demurrer. On the 13th of March Mr. Pagani petitioned the House of Lords to dismiss the petition of appeal of Mr. Vining, on the ground that the appeal from the judgment on demurrer lay to the full Court, and not to the House of Lords. On the 4th of May Mr. Pagani's petition came on for consideration before the appeal committee of

(1) 2 Sw. & Tr. 278; 30 L. J. (P. M. & A.) 258.

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the House of Lords, who ordered all questions raised by the petitioner to be reserved until the hearing of the cause at the bar of the House. On the 12th of June, the co-respondent lodged his case for appeal, and set the cause down for hearing. The case was ordered to be tried before a special jury on the 6th of July.

Dr. Twiss, Q.C., and *Dr. Tristram*, moved the Judge Ordinary to direct that the trial of the issues of fact in this cause should be postponed until judgment was given by the House of Lords on the question raised by the demurrer. Marriage was the foundation of the suit; if there was no marriage, there could be no adultery, or damages given. The fact of the marriage should be ascertained before the parties are put to the expense of trying the further issues. When, in a divorce suit, the validity of an asserted marriage is denied, the suit becomes practically in the first instance one of nullity of marriage, and it was the uniform practice of the Ecclesiastical Courts to determine the validity of the marriage before proceeding further with the suit: *Robins* v. *Sir Wm. Wolseley* (1); *Montague* v. *Montague* (2); *Mayhew* v. *Mayhew* (3); *Guest* v. *Guest*. (4)

Dr. Spinks for the petitioner. The question decided on the demurrer is an interlocutory matter, which the Judge Ordinary could, under 20 & 21 Vict. c. 85, s. 9, have heard alone: *Palmer* v. *Palmer* (5); and the appeal is therefore to the full Court, and not the House of Lords. The co-respondent should wait until a final decree is made, and then appeal to the House of Lords on the whole case. The present application is merely for the purpose of delay.

Dr. Twiss and *Dr. Tristram* in reply. 1st. It is incorrect to say that this is a mere interlocutory matter, and would have been so treated before 23 & 24 Vict. c. 144 was enacted: *Evans* v. *Evans and Robinson*. (6) It is a material issue in the cause arising on the hearing of part of the petition, and the appeal must be direct to the House of Lords. By s. 10 of 20 & 21 Vict. c. 85, all petitions for dissolution or for nullity of marriage were to be heard before the full Court. On the hearing of any such petition,

(1) 1 Lee, 616.
(2) 2 Add. 375.
(3) 2 Phill. 11.
(4) 2 Hagg. Cons. 321.
(5) 2 Sw. & Tr. 61.
(6) 1 Sw. & Tr. 173; 27 L. J. (P. M. & A.) 57.

questions of law or fact, or both, may arise. The ordinary way of raising a question of law is by demurrer. The legislature never could have intended that when a question of law, going to the cause of action, was raised by demurrer, it was to be decided by the Judge Ordinary in the first instance, with an appeal only to the full Court, whose decision is to be final (s. 55); whilst questions of law raised incidentally at the hearing, and all questions of fact, were to be heard by the full Court, with an appeal to the House of Lords. The hearing of a petition in s. 10 means the hearing of all material questions of law or fact arising (howsoever) on the petition. 2ndly. If the appeal lies to the full Court, the House of Lords, by s. 55, is precluded from ever entertaining the question raised by the demurrer. 3rdly. If this question had been raised in a suit for nullity of marriage, as in *Wing* v. *Taylor* (1), it would have been by demurrer to the only material parts of the petition, and if such demurrer were by s. 10 to be heard by the Judge Ordinary in the first instance, the question could never reach the House of Lords.

Cur. adv. vult.

June 26. THE JUDGE ORDINARY. This case stood over, in order that I might consider the question whether the trial of the matters of fact in dispute should be postponed until an alleged appeal to the House of Lords has been determined. The suit is one for dissolution of marriage. The co-respondent traversed the marriage for grounds stated in certain paragraphs of his answer, and denied the adultery. The petitioner demurred to that part of the answer, thereby admitting the facts, and raising the question of law, and the Court upon hearing the demurrer determined that the plea was no answer to the petition. It is now said that the co-respondent has appealed to the House of Lords upon that point, and I took time to consider whether there is any right of appeal to the House of Lords upon that decision. Without going over the sections of the act of parliament, it is beyond doubt, that all matters which, when the court was originally constituted, might be done by the Judge Ordinary alone, were the subject of appeal to the full Court, and that all matters that could only be

(1) 2 Sw. & Tr. 278; 30 L. J. (P. M. & A.) 258.

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decided in the then state of the law by the full Court were the subject of appeal to the House of Lords. When the subsequent act passed, and the Judge Ordinary was authorized to execute the functions of the full Court, the same state of things remained, namely, those matters which he could before have done by himself remained still the subject of appeal to the full Court, and those matters which under the new law he does as exercising the power of the full Court became the subject of appeal to the House of Lords.

The question, then, really is, whether this judgment on demurrer was a matter that fell within the cognizance of the Judge Ordinary sitting alone under the first Divorce Act? I am of opinion that it did. The only way in which this act can be construed is to consider that all matters short of a final decree—all interlocutory matters, save those specifically excepted—were referred to the Judge Ordinary. Section 9 says: "The Judge Ordinary shall have full power to determine all matters arising in the court, except petitions for dissolving of or annulling marriage, and applications for new trials of questions or issues before a jury, bills of exceptions, special verdicts, and special cases; and except as aforesaid may exercise all the powers and authority of the said court."

I think it impossible to say that this section can mean anything but one of two things. It must either mean that the Judge Ordinary can do nothing in a suit for dissolution of marriage, or it must mean that he can do everything in the suit short of dissolving the marriage by a final decree. The practice of the court shews, that up to the time the law was altered, the Judge Ordinary could do all ordinary business in the suit short of the final decree; all matters that may be properly called interlocutory. This is a judgment on a demurrer, and it is very true that in some cases a judgment on a demurrer may be final. The same rule would obtain here as at common law in this respect. Sometimes the state of pleadings is such, that when the Court gives judgment on them it decides then the whole suit; but there are judgments on demurrer which are interlocutory only, and this is, I think, one of them. It was a judgment on part of an answer. There were other parts of the answer which remained, and therefore there was nothing final in the judgment of the Court. It was essentially

interlocutory. The co-respondent will be entitled, when the case is heard, to carry the whole matter to the House of Lords. In the meantime the case must go on.

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Motion rejected with costs.

This case was arranged, and the jury, on July 6, were discharged without being sworn.

Attorneys for petitioner: *Merriman & Buckland.*
Attorneys for co-respondent: *Walker & Martineau.*

WATTON *v.* WATTON AND OASTLER.
DOW *v.* DOW AND MACANN.
DAVIES *v.* DAVIES AND MACARTHY.

1866
June 26.

*Dissolution of Marriage—Decrees Nisi and Decrees Absolute—*23 *&* 24 *Vict. c.* 144, *s.* 7—29 *Vict. c.* 32, *s.* 3.

The 3rd section of the 29 Vict. c. 32, which extends the time for making decrees nisi absolute from three to six months, applies to suits pending at the time when the act came into operation. But where decrees nisi had been pronounced before the act came into operation, whereby three months had been fixed as the time at the expiration of which they were to be made absolute, the Court held that it was at liberty under the proviso to the section, "unless the Court shall, under the power now vested in it, fix a shorter time," to make them absolute at the end of the three months.

In each of these cases a decree nisi had been pronounced for the dissolution of the marriage, in the usual terms, namely, that "unless sufficient cause be shewn to the Court why this decree should not be made absolute within three months from the making thereof," the marriage should be dissolved. The three months having expired and affidavits having been filed shewing that no cause had been shewn against the decrees, the Court was moved, on the 12th June, that they should be made absolute.

The Judge Ordinary. The 29 Vict. c. 32, received the royal assent yesterday (11th June), and came into operation immediately on its being passed. The 3rd section enacts that "no decree nisi for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the

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Court shall, under the power now vested in it, fix a shorter time." I shall not make any decrees absolute to-day, but the motions may stand over, and I will hear any arguments which counsel may urge, for the purpose of satisfying me that I am justified in making such decrees, before the expiration of six months from the dates of the decrees nisi.

June 26. *Dr. Wambey* (for the petitioner in *Watton* v. *Watton and Oastler*). The Court cannot give a retrospective operation to the statute.

[THE JUDGE ORDINARY. When a statute is passed creating new rights, it ought, if possible, to be so construed as not to extinguish existing rights. This statute does not affect the rights of suitors, but simply alters the mode of procedure in suits. A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits which commenced before its passing.]

The petitioner has acquired a right, under the 7th section of the 23 & 24 Vict. c. 144, to have his decree made absolute at the end of three months, no cause to the contrary being shewn, and the three months having expired before the 29 Vict. c. 32 received the royal assent, the statute would have a retrospective operation if it took away that right. [He referred to Dwarris on Statutes, 540; Broom's Legal Maxims, 34.]

[THE JUDGE ORDINARY. The only question is, whether the new course of procedure introduced by the act applies to suits pending when the act passed.]

Inderwick (for the petitioner in *Dow* v. *Dow & Macann*). These cases come within the proviso, "unless the Court shall, under the power now vested in it, fix a shorter time." The Court has fixed a shorter time, namely, three months, by the decrees nisi which it has pronounced under the power now vested in it.

Dr. Swabey, was for the petitioner in *Davies* v. *Davies and Macarthy*.

THE JUDGE ORDINARY. It is very clear that the petitioners have no such right as is contended for by Dr. Wambey. If there were any such right it must be created by the 23 & 24 Vict.

c. 144, s. 7, which enacts that "every decree shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by a general or special order from time to time direct." It is impossible to torture that language into an expression of a suitor's right to a decree absolute directly the three months have expired. It cannot be made absolute before the three months, but it may be made absolute at any later time. I am also strongly of opinion that had it not been for the proviso, the 29 Vict. c. 32, s. 3, would have applied to all pending cases, because it merely alters the mode of procedure. And although a suitor may have a vested right to a decree, the mode and method in which he is to approach the Court in order to obtain it, and the time within which that or any other step in the cause is to be taken, are merely auxiliary to that right, and may be changed, either by the legislature or by the rules and orders of the Court, without any infringement of the right itself. I should be prepared to hold, therefore, that the statute applies to all pending suits, and from my recollection of the practice of the common law courts, I think authority could be found for such a decision. But the proviso renders it unnecessary to decide that question, for it gives the Court power, notwithstanding the prohibition contained in the first branch of the section, to fix a shorter time than six months (but not shorter than three months), for making decrees absolute. As the prohibition, therefore, is not absolute, and the Court may make a decree in a shorter time, I think it ought to do so where it has already by general or special order fixed a shorter time. The question then is, whether in these cases the Court has by general or special order fixed a shorter time. I think that substantially it has done so by special order, for by the decrees nisi it has fixed three months. I therefore make the decrees absolute.

Attorneys for the respective petitioners: *B. Hunt; Hunter & Co.; Jones & Starling.*

1866
July 10.

LOUIS *v.* LOUIS.

Permanent Alimony—Proportion of Income.

In allotting permanent alimony the Court will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than the wife, and when that is the case will not allow her the usual proportion of such income.

The petitioner, Lady Louis, was judicially separated from her husband, Sir John Louis, Bart., on the ground of his adultery, on the 22nd June, 1864. Permanent alimony was allotted to her on the 12th July, 1864, at the rate of 40*l.* per annum. At that time Sir J. Louis was a lieutenant in the Indian army, and was in England on furlough, and his pay was 120*l.* per annum. Lady Louis had since filed a petition praying for an increased allowance on the ground that he had been promoted to a captaincy, and was under orders for India, and that on his arrival in India his pay would be increased. Sir J. Louis had filed an answer wherein he admitted that he was about to proceed to India, and that on his arrival in that country his pay as a captain would be 480*l.* per annum.

Dixon, an increase of income to the amount of 360*l.* being admitted, moved for an increase of alimony in the usual proportion of one-third.

Searle, for the respondent. As the husband will be obliged to live in India, and will be on service, his living will necessarily be more expensive than if he were to remain in England, and a smaller proportion of the income should be allotted.

The Judge Ordinary. I think the Court is bound to take into consideration that the husband is going to serve in a country where the living is much more expensive than in England, and that he receives an increased salary on that account, whilst the wife will remain in England. The ordinary proportion of the income of 480*l.* would be 160*l.*, but I think justice will be done if I allot 120*l.*, being 80*l.* in addition to the 40*l.* which the petitioner already receives. The increased allowance to commence at the

same time as the increased pay of the respondent, and to be payable quarterly. 1866

LOUIS v. LOUIS.

Attorneys for petitioner: *Sewell, Sewell, & Edwards.*

Attorneys for respondent: *Walter & Moojen.*

BIRD *v.* BIRD. *July* 24.

Settlements—22 & 23 *Vict. c.* 61, *s.* 5—*No living Issue of Marriage.*

The Court has no power to make an order with reference to the application of settled property under the 5th section of the 22 & 23 Vict. c. 61, unless there is issue of the marriage living at the time when the motion for the order is made.

ON the 4th February, 1865, a decree nisi, and on the 4th July, 1865, a decree absolute was pronounced for the dissolution of the marriage in this case by reason of the husband's adultery and cruelty. The petitioner afterwards presented a petition under the 5th section of the 22 & 23 Vict. c. 61 (1), praying for an order with reference to the application of a portion of the property comprised in an ante-nuptial settlement. Answers to the petition were filed by the respondent and by Henry Bathe, intervening, as a purchaser for valuable consideration of the interest of the respondent in the settled property. These answers alleged that there was no issue of the marriage living at the time when the decree was pronounced, but that there had been one child of the marriage born on the 4th September, 1864, which died a few hours after its birth; and that on the 17th January, 1865, the respondent had conveyed his interest in the settled property to Henry Bathe for valuable consideration. Affidavits had been filed in proof of these allegations, and the matter had been referred under the 101st rule to one of the registrars, who had filed his report.

Dr. Deane, Q.C. (*Dr. Swabey* with him), for the petitioner,

(1) "The Court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit."

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moved that the registrar's report might be confirmed, and for an order with reference to the application of the settled property as prayed by the petitioner. In *Thomas* v. *Thomas* (1), the full Court held that it had not jurisdiction to deal with settlements under this section in cases where there has been no issue of the marriage. That decision applies only to cases where there has never been any issue of the marriage. In this case there has been issue of the marriage, and the petitioner has been a "parent," and the fact that the child is not now living does not take away the jurisdiction of the Court. He also submitted that the petitioner's right to an order could not be defeated by the conveyance to the intervener.

Searle, for the trustees of the settlement, supported the prayer of the petitioner.

E. K. Karslake (*Dr. Spinks* with him), for the intervener. *Thomas* v. *Thomas* (1) is a conclusive authority against the petitioner.

THE JUDGE ORDINARY. It is not necessary to go into the question of the effect of the conveyance. I think I am precluded by the decision in *Thomas* v. *Thomas* (1) from inquiring what was the meaning of the legislature in this section. If I were allowed to speculate as to its meaning, I should have considerable difficulty in finding any reasonable ground for giving the Court power to make orders in reference to settled property, in cases where there are children, and for withholding such a power from it in cases where there are no children. But the legislature in putting their intention, whatever it may have been, into language, have used the word "parents," and not any such words as "husband and wife," or "the parties to the suit." I have no doubt that the learned judges who decided *Thomas* v. *Thomas* (1) felt that they were bound by the word "parents," and that where the parties were not "parents" the section could have no application. I must take that decision as my text, and ask myself whether there is any "parent" in this case. There was once a "parent" because there was once a child; but it is impossible to say that a person who has no child living, and whose only child may have died twenty

(1) 2 Sw. & Tr. 89.

years ago, is now a parent. The same ratio decidendi which guided the full Court in *Thomas* v. *Thomas* (1), must control my decision in this case. I hold, therefore, that I have no power to give the relief sought. 1866 BIRD v. BIRD.

Dr. Deane asked for the costs of the petitioner.

Searle asked for the costs of the trustees.

THE JUDGE ORDINARY thought it was a fair question for argument, and therefore directed the petitioner's costs to be paid by the respondent, but made no order as to the costs of the trustees.

Attorneys for petitioner and trustees: *Edwards, Layton, & Jaques.*

Attorneys for respondent and intervener: *Chester & Co.*

BOARDMAN *v.* BOARDMAN, THE QUEEN'S PROCTOR INTERVENING.

July 26.

Evidence—Suit founded on Adultery—Cross-examination of Parties as to Adultery—Right of Queen's Proctor to cross-examine—14 & 15 Vict. c. 99, s. 4—16 & 17 Vict. c. 83, s. 5—22 & 23 Vict. c. 61, s. 6—Cruelty—Reckless communication of Disease.

A petitioner and a respondent in a suit for dissolution of marriage, who are examined under the 6th section of the 22 & 23 Vict. c. 61, upon an issue of cruelty or desertion, may be cross-examined upon issues of their own adultery, and of each other's adultery.

The Queen's Proctor intervening, and alleging collusion and the adultery of the petitioner, is entitled to cross-examine all the witnesses called by the petitioner and the respondent. When the respondent has been examined under the 6th section of the 22 & 23 Vict. c. 61, the Queen's Proctor may, therefore, cross-examine him for the purpose of proving the petitioner's adultery.

If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty.

THIS was a petition by a wife for dissolution of marriage on the ground of the adultery, coupled with the cruelty, of the husband. The only cruelty charged was wilful communication to the wife of the venereal disease. The respondent filed an answer traversing

(1) 2 Sw. & Tr. 89.

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the allegations in the petition, and pleading condonation. The Queen's Proctor intervening under the 7th section of the 23 & 24 Vict. c. 144, alleged that the petitioner and the respondent were acting in collusion, and that the petitioner had been guilty of adultery. These issues came on for trial before the Judge Ordinary by a special jury.

The petitioner was examined under the 6th section of the 22 & 23 Vict. c. 61, on the issue of cruelty.

The Solicitor General (*Hannen* with him), for the Queen's Proctor, proposed to cross-examine her upon the issue of her adultery.

Coleridge, Q.C. (*Dr. Spinks* with him), for the petitioner, did not object if he was at liberty to re-examine her upon that issue.

[THE JUDGE ORDINARY. That follows as a matter of course. I think that when a witness is put into the box upon the issue of cruelty, there is nothing in the act which excludes a cross-examination, which may touch the question of adultery; for such a course of examination may shew the sort of life she has been leading, and may hold her up to the jury as a person unworthy of credit. Besides, in this case her evidence upon the issue of her adultery is material to the issue of cruelty, the only cruelty charged being the communication of the venereal disease.]

The petitioner was accordingly cross-examined and re-examined upon the issue of her adultery.

At the close of the petitioner's case, the respondent, who conducted his case in person, went into the witness-box, and gave evidence upon the issue of cruelty.

The Solicitor General proposed to cross-examine him upon the issue of the petitioner's adultery.

Coleridge, Q.C., objected. The Queen's Proctor has not traversed the cruelty, and is not entitled to cross-examine on that issue. The respondent is not a competent witness in support of the charge of adultery brought against his wife by the Queen's Proctor.

[THE JUDGE ORDINARY. I think that the Queen's Proctor is entitled to cross-examine all the witnesses called by the petitioner and the respondent upon the issues which he has raised of collusion and of the adultery of the petitioner. It is extremely difficult, if not impossible, to work out the enactments of the legis-

lature with regard to evidence consistently with each other as they stand. The parties to these suits being competent witnesses as to the cruelty, and the statute (1) which renders them competent witnesses containing no negative words excluding their evidence on other matters, the only rule I can lay down is, that when they are examined upon that issue they can be cross-examined within the usual limits. Any question material to the issues which the jury have to try, or bearing on the credit of the witness, is within the usual limits of cross-examination, and it is impossible therefore to exclude the evidence of the parties upon the issue of adultery, if it comes out in cross-examination. The statutes (2) excluding the evidence of the parties in proceedings instituted in consequence of adultery, prevented them from being put into the witness-box, but an exception has been engrafted on those statutes, by which in certain cases they are allowed to go into the witness-box. I think that when they are in the witness-box they must be examined and cross-examined according to the ordinary rules of evidence.]

The respondent was accordingly cross-examined by the *Solicitor General*, and also by *Coleridge*, upon the issue of the petitioner's adultery.

[THE JUDGE ORDINARY, in summing up, after directing the jury upon the issue of adultery, directed them upon the issue of cruelty as follows: The next question, whether the respondent has committed cruelty, is not nearly so easy to determine as that of adultery. It depends more on reasonable inference and just conclusion than on facts alone. There is not a trace of any cruelty except the communication of the venereal disease. The law regards an act of that character as cruelty, and I think your sympathies will go along with it. It says that if a man has a venereal complaint, and knowingly communicates it to his wife, he is guilty of cruelty. Now, if a man knowing that he was suffering from a complaint of that sort, had intercourse with his wife, and did communicate it to her, even although he were to swear, and you were to believe him, that he did not mean to communicate it, I doubt whether you ought not to say that he had been guilty of cruelty.

(1) 22 & 23 Vict. c. 61, s. 6.
(2) 14 & 15 Vict. c. 99, s. 4; 16 & 17 Vict. c. 83, s. 2.

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If he knew that his body was tainted, and that he might communicate the disease, if he knew that he was running the risk of giving his wife the complaint from which he was suffering, and he did give it to her, I am disposed to think that would be an act of cruelty. But you must go as far as that—you must be satisfied that he had reason to believe that he was doing a hazardous act, an act which might probably have the effect of communicating the disease to her.]

Before the jury delivered their verdict they asked the Judge Ordinary whether the husband would be guilty of cruelty if he had exercised indiscretion and recklessness in marital intercourse, and so communicated the disease to his wife without actual knowledge that he was infected.

[THE JUDGE ORDINARY. If the husband knew that he was in such a state of health that the having connection with his wife would be a reckless act, I think the communication of the disease would amount to cruelty. I think that mere indiscretion, if it went no further than that, would not be sufficient; but if you think that, looking at the state of his health, and of his knowledge of his health, he recklessly had communication with her, and thereby communicated the disease, that, in my opinion, is cruelty.]

The jury found that the respondent was guilty of adultery and of cruelty, and that the petitioner was not guilty of adultery.

July 26. THE JUDGE ORDINARY. I forbore to pronounce a decree in this case after the jury had delivered their verdict yesterday, because as the respondent was inops consilii, I wished to consider whether I was correct in the ruling which I gave to the jury on the issue of cruelty. I find that in *Jones* v. *Jones* (1) the full Court adopted the judgment of Dr. Lushington in *Ciocci* v. *Ciocci* (2), and the Judge Ordinary said: "The alleged act of cruelty is the communication of a disease of a peculiar character, and it is said there are grounds which should induce the Court to believe that the respondent communicated that disease to the petitioner wilfully, or, at all events, that he knew he was in a condition which made it probable that he would communicate it as in the case of *Ciocci* v. *Ciocci* (2), *and that he was perfectly*

(1) Searle & Smith Rep. 138. (2) 1 Ecc. & Ad. 121.

reckless whether he communicated it or not." In *Ciocci* v. *Ciocci* (1), Dr. Lushington said: "If this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances" (*i. e.* having been suffering from venereal disease for some time immediately prior to the marriage), "and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, *such utter recklessness of the health and comfort of his wife,* that if he did communicate such disease he was guilty of cruelty in the eye of the law; and I should hold this upon the principle that whoever does an act likely to produce injury and the injury follows, can never excuse himself by saying that he hoped a probable consequence might, by some peculiar good fortune, not follow." In this case the jury adopted the term "reckless," and they found the cruelty proved. I pronounce a decree nisi, with costs.

Attorneys for petitioner: *Field, Roscoe, & Co.*
The Queen's Proctor.

BLAND *v.* BLAND. *July* 28.

Dissolution of Marriage—Previous decree of Judicial Separation on ground of Husband's cruelty—Husband's subsequent adultery.

Where a wife had obtained a decree of judicial separation on the ground of the husband's cruelty, and continued to live separate from him, and the husband subsequently committed adultery, upon proof of such adultery, and of the decree for judicial separation, the Court made a decree nisi for the dissolution of the marriage.

THIS was a petition for dissolution of marriage by the wife, on the ground of the respondent's adultery and cruelty. The respondent did not appear. On the 8th of May, 1862, Sir C. Cresswell had pronounced a decree for judicial separation in favour of the petitioner, on the ground of the respondent's cruelty. Since that time they had lived separate and apart from each other.

The Queen's Advocate (*Sir R. Phillimore*), and *W. A. Clark,* appeared for the petitioner.

(1) 1 Ecc. & Ad. 121.

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Proof was given of the marriage, and of adultery committed by the respondent subsequent to the decree for judicial separation. The original decree for judicial separation on the ground of cruelty was before the Court, and evidence was given of the respondent's identity with the respondent in the suit for judicial separation.

THE JUDGE ORDINARY, upon the above evidence, pronounced a decree nisi. (1)

Attorneys for petitioner: *Tippets & Son.*

(1) *Ritchie* v. *Ritchie*: 4 Macq. H. L. R. 162.

CASES

DETERMINED BY THE

COURT OF PROBATE

AND BY THE COURT FOR

DIVORCE AND MATRIMONIAL CAUSES,

FROM

MICHAELMAS TERM TO TRINITY TERM,

XXX VICTORIA.

SMITH *v.* SMITH.

1866
Nov. 6.

Costs of Unsuccessful Opposition to Will—Plea of Undue Influence.

It is not an invariable rule that the unsuccessful opponent of a will who has pleaded undue influence will be condemned in costs. The Court refused to condemn a next of kin in costs, although he had pleaded undue influence, being of opinion that, under the circumstances of the case, the plea was not an unreasonable one.

Alice Smith, the plaintiff, propounded the will of Thomas Smith, of Lytham, in the county of Lancaster. John Smith, the defendant, pleaded, in opposition to the will, undue execution, incapacity, and the undue influence of the plaintiff. Those issues were tried at Liverpool, before Lush, J., by a common jury, and a verdict was found for the plaintiff.

The plaintiff was the widow of the testator, and the defendant was his brother, and next of kin. By the will, which was executed on the 18th of May, 1866, he left all his property to his widow absolutely, and appointed her sole executrix. The will was not prepared by a solicitor, but by a tax-collector who was in the habit of making wills. The testator died on the 19th of May, 1866.

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SMITH v. SMITH.

The Court having pronounced for the will,

Dr. Swabey, for the plaintiff, moved that the defendant might be condemned in costs. The circumstances disclosed by the evidence were such that the next of kin may have been justified in disputing the testator's capacity, but as he also put a plea of undue influence on the record, which he failed to establish, the case falls within the ordinary rule, and he must be condemned in costs.

Dr. Spinks, for the next of kin, opposed the motion, and moved for his costs out of the estate. He referred to various parts of the evidence, the substance of which is stated in his Lordship's judgment.

SIR J. P. WILDE. I can see enough of this case to decide the question of costs without consulting the learned judge who tried it. It is conceded by Dr. Swabey that the circumstances under which this will was made were such that there was reasonable ground for having the testator's capacity investigated. The will was made by answers of "aye" and "no" within a day of the testator's death, at a time when the doctor who attended him could not get him to explain what his symptoms were, and said he was in a state of muttering delirium, and within a short time of his being seen by the clergyman, who described him as rambling and lying with his eyes vacant. It is not disputed that such a state of things challenged investigation by the next of kin; but then it is said that he ought to be condemned in costs because he put a plea of undue influence on the record. Now, practically, the meaning of that plea differs very much in different cases. No doubt it is frequently pleaded where it had better be left out. A pure case of undue influence can hardly ever be established, but it is often mixed up with the question of capacity. A person lying in such a state that he is only capable of saying aye or no, puts his name to a paper which it is suggested he does not understand, and the whole question in the case turns on the degree of pressure exercised on the one side, and on the capacity to resist it on the other. It seems that in this case the testator gave no directions to send for the will-maker, and the Court must look upon the sending for him as the act of the wife.

there can be no doubt that she meant the paper to take effect after her death.

Dr. Spinks, for the defendant. The inference to be drawn from the evidence is, that the testatrix intended to make a present gift of all her property to her sister, and she thought that handing over to her the bank-book and the stock receipts would have that effect. The subsequent acts of the plaintiff also point to that conclusion, for she immediately set about getting the whole of the money out of the bank, or having it transferred to her own name, and the testatrix appears to have signed papers with the object of enabling her to do so.

SIR J. P. WILDE. It is clearly proved that the paper was duly executed on the day on which it bears date. The only question raised with respect to it is, whether it was meant to be testamentary. In order to form a proper judgment, it is very material to look at the words written and the acts done by the testatrix in the light in which a person of her imperfect education would be likely to regard them, and not to attach anything like a technical meaning of which she was ignorant to the language she has used.

The expression, "I wish my sister to have," &c., appears to me to imply, "I wish her to have after my death," because when she wrote those words she was dangerously ill, and did not expect to live, and if she had merely wished to make her sister a present she would not have taken the trouble to write anything at all, but would simply have handed over the bank-book to her, as she afterwards did the stock receipts. Nor do I think it at all probable that she intended to make her sister a present of the whole of her savings in the bank, whether she lived or died. It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary. The alternative presented to the Court is this: either the paper was testamentary, or it was intended as an out and out gift, so that even if the deceased had been fortunate enough to recover from her illness, and to live until this moment, she would have made a present of everything in the savings bank to her sister. I think that is quite contrary to what was passing in her

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in the Charing Cross Savings Bank, and the rest, 250*l.*, was in the funds. In October, 1865, being then in very ill health, she went to live with her sister, Mrs. Cock, at 104, York Road, Lambeth, and remained there until her death. On the night of the 6th of December, 1865, an old friend of hers, Mrs. Hannon, was sitting up with her, and she said she had been foolish enough to make a will, but she wished to make another one in favour of her sister, Mrs. Cock, and that her nephews and nieces should not have a penny of her money. Mrs. Hannon, by her direction, took some papers out of a box in her room, and she looked them over and kept one of them, and said it was the "unfortunate will she had been foolish enough to make." No one had seen this or any other will, and no will, except the paper propounded, was found after her death. In the course of the same night she told Mrs. Hannon that she intended to write a "little will" for her sister, and she asked for pen and ink and paper. They were brought to her by Mrs. Hannon, and she then wrote out the paper propounded, and said she ought to have a second witness. Mrs. Hannon then called in Joseph Sellick, who was a lodger in the house, and the will was duly executed, Mrs. Hannon and Sellick being the attesting witnesses. These facts were proved by the plaintiff and Mrs. Hannon and Sellick, and the plaintiff further gave evidence of declarations made by the deceased to the effect that she wished her to have the money in the bank after her death. In cross-examination, the plaintiff stated that she had drawn 19*l.* out of the bank before her sister died, which she gave to her sister, and her sister handed back to her; that she had tried to get the rest of the money out of the bank, and her sister had signed some papers to enable her to do so, but the secretary refused to pay it; that her sister gave her the stock receipts for the money in the funds, as well as the bank-book, and said: "You take care of them, and should I die you are to have the money;" and that on the morning when the paper was signed she said: "I shall disappoint my nephews and nieces, they have not a demand on me for a penny."

Dr. Wambey, for the plaintiff. The only question is, as to the intention of the testatrix, and, looking at all the circumstances.

there can be no doubt that she meant the paper to take effect after her death.

Dr. Spinks, for the defendant. The inference to be drawn from the evidence is, that the testatrix intended to make a present gift of all her property to her sister, and she thought that handing over to her the bank-book and the stock receipts would have that effect. The subsequent acts of the plaintiff also point to that conclusion, for she immediately set about getting the whole of the money out of the bank, or having it transferred to her own name, and the testatrix appears to have signed papers with the object of enabling her to do so.

SIR J. P. WILDE. It is clearly proved that the paper was duly executed on the day on which it bears date. The only question raised with respect to it is, whether it was meant to be testamentary. In order to form a proper judgment, it is very material to look at the words written and the acts done by the testatrix in the light in which a person of her imperfect education would be likely to regard them, and not to attach anything like a technical meaning of which she was ignorant to the language she has used.

The expression, "I wish my sister to have," &c., appears to me to imply, "I wish her to have after my death," because when she wrote those words she was dangerously ill, and did not expect to live, and if she had merely wished to make her sister a present she would not have taken the trouble to write anything at all, but would simply have handed over the bank-book to her, as she afterwards did the stock receipts. Nor do I think it at all probable that she intended to make her sister a present of the whole of her savings in the bank, whether she lived or died. It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary. The alternative presented to the Court is this: either the paper was testamentary, or it was intended as an out and out gift, so that even if the deceased had been fortunate enough to recover from her illness, and to live until this moment, she would have made a present of everything in the savings bank to her sister. I think that is quite contrary to what was passing in her

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mind. The very nature of the transaction points to her intention that the paper should only take effect in the event of her death, an event which both she and her sister considered certain and imminent. In addition to this there is the direct testimony of the persons who were present, and the fact that she asked for a second witness, which looks as if she knew that the law requires two witnesses to attest a will.

It was forcibly argued that what afterwards took place shews that it was intended as a deed of gift, because the plaintiff, with the sanction of the deceased, immediately set to work to get the money out of the bank, without waiting for her death. It is true that she did so, and it is equally true that the testatrix signed certain papers (which are not produced) for that purpose, and gave them to her. It is quite consistent with this paper having been written to secure the money to the plaintiff upon her death, that she afterwards signed papers to enable her sister to get it out of the bank at once, although even if the plaintiff had got it out of the bank, I believe it was the intention that it should belong to the testatrix if she recovered, and not to the plaintiff. In that event the deceased would have expected to have it handed over to her, and the plaintiff would, I believe, have handed it over. I therefore pronounce for the paper as testamentary.

Dr. Wambey. It is necessary to ask for an order for the plaintiff's costs out of the estate, as it is not a matter of course that the grant of administration with the will annexed, will be made to her.

Dr. Spinks moved for the defendant's costs out of the estate.

SIR J. P. WILDE. I order the plaintiff's costs to be paid out of the estate. I shall not condemn the defendant in costs, but there is no pretence for asking for his costs out of the estate.

Solicitor for plaintiff: *Stroughill.*
Solicitor for defendant: *J. H. Wrentmore.*

JOHN *v.* BRADBURY AND OTHERS. *Nov.* 13.

Administration—Guardian of Infant—Administration Bond—Creditors—Justifying Security.

The guardian of an infant, sole next of kin of an intestate, is entitled to take administration of his effects, in preference to creditors.

The general rule is, that creditors are not entitled to require the next of kin, or the guardian of the next of kin, to give justifying security; and a very strong case ought to be made out before a departure from the rule is allowed.

ELIZABETH JOHN, the plaintiff, prayed the Court to decree to her administration of the effects of Henry David John, the deceased in this case, as the duly assigned guardian of Ellen Louisa John, his infant child and sole next of kin, without requiring the sureties to the administration bond to justify, as prayed by the defendants, who were creditors of the deceased.

The deceased, who had carried on the business of a draper in Swansea, Glamorganshire, perished with his wife and one child in a fire which occurred on his premises on the 10th of May, 1866. He died intestate, leaving Ellen Louisa John his only surviving child, and the sole party entitled in distribution, an infant of the age of two years, and whose nearest living relative is the plaintiff, her paternal grandmother.

The property of the deceased consisted of a fire policy for 3000*l.* on his stock in trade, which would be paid in full; two policies on his own life, one for 1000*l.* in the Accidental Marine Insurance Company, and the other for 500*l.*; 500*l.* book debts; 100*l.* cash; an interest on the lease of his business premises, estimated at 100*l.*; and in certain other houses, which were mortgaged, but had been sold by the mortgagee since his death.

His debts were estimated by the defendants at 3700*l.* The plaintiff also had a claim for about 500*l.* on his estate, 300*l.* of which would be defrayed out of the money received for the sale of the houses.

On the 25th of May, the deceased's creditors held a meeting, at which (amongst other things) a resolution was passed to the effect, that it was expedient for the creditors to take out administration to the deceased's estate, and a person went down to Swansea on

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behalf of the creditors, and endeavoured to take his effects out of the custody of the deceased's family.

On the 14th of July, the plaintiff was assigned guardian to the infant, and on the 16th of July she was served with a citation, which had been previously extracted by the defendants, calling upon the infant to accept or refuse administration, or to shew cause why it should not be granted to the defendants as creditors. On the 18th of July, the plaintiff entered an appearance as guardian of the infant, and accepted the grant. On the 22nd of July, the defendants entered a caveat, and refused to withdraw it unless the plaintiff's sureties to the bond justified, and it was for the purpose of getting rid of this caveat that the present application was necessary. The plaintiff had subsequently entered into a negotiation with the defendants to avoid the necessity of this application, in which she offered to allow the policy for 3000*l.* and other assets, to be paid to the joint names of herself and any two other creditors. It appeared by the affidavits, that one of the proposed sureties to the first bond had subsequently compounded with his creditors, but that the plaintiff had afterwards substituted another surety in his place, and that both the sureties now offered were responsible persons, but not able to justify to the amount required. There was nothing stated against the credit of the plaintiff.

Dr. Tristram moved that the administration be granted to the plaintiff as guardian of the infant, without the sureties being required to justify. The attempt made by the defendants is contrary to the practice of the Court, and if acceded to would be a great hardship upon the infant. Next of kin and legatees are entitled to call on the sureties to justify to the extent of their interests in the estate; but it has been laid down by Sir George Lee—*Hughes* v. *Cookson* (1), *Hickman* v. *Black* (2)—in two cases which have not been overruled, that this privilege does not belong to creditors. In a recent case in chambers, reported in a note in Coote's Probate Practice, 6th edition, p. 78, the sureties were ordered to justify on the application of a creditor, but there the proposed administrator was insolvent. Assuming that the Court

(1) 1 Lee, 386. (2) 2 Lee, 251.

has authority to order justifying securities at the instance of creditors, it will only do so under very peculiar circumstances (but there are none in this case), such as where the estate is insolvent, or the proposed administrator or the sureties are insolvent or not people of credit. If creditors are to be allowed, as a matter of right, to insist upon sureties justifying, the administration of the estates of intestates will in a great many instances be taken from the families of the deceased and handed over to strangers, who know nothing of his affairs, and have no interest in securing a residue.

Dr. Spinks, contrà. The Accidental Life and Marine Insurance Company is being wound up in Chancery, so there will be little or nothing recovered from the 1000*l.* policy on the deceased's life; and the estate is therefore insolvent. The plaintiff is too aged efficiently to administer the estate. She has no interest in the property, and merely claims as the guardian of the party interested, and so is not within the statute, and may, and in this case should, in the discretion of the Court, be passed over for the creditors: *West* v. *Willby*. (1)

Dr. Tristram in reply.

SIR J. P. WILDE. I can quite understand the struggle for this grant, and that the creditors are desirous of having some means under their own control of seeing that their debts are paid. But the question is, not whether there is a good ground for the contest, or whether it is reasonable that the creditors should desire to have the grant. The question is, what is the rule of law that applies to such a case? And it is of vital importance that there should be a rule, because if there were no general rule, the consequence would be, that whenever a person died intestate and left property to any considerable amount, there would be a struggle, and possibly a suit in this court, to determine to what party the grant should be given. I think, therefore, the value of a rule is very great. The only question is, what is the rule? And as to that there can be no doubt. Dr. Spinks, who said all that could be said for the claim of the creditors, did not deny that the general rule is, that the person representing the next of kin is entitled

(1) 3 Phillim. at p. 381.

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to the grant. There is no reason for departing from the rule in this case. No doubt, therefore, the grant must be made to the guardian of the infant. But it is said that, under the peculiar circumstances, the sureties ought to justify. Again the Court must advert to the rule, although I quite admit that cases may arise in which the general rule, however good, may be departed from. But a strong case ought to be made out before a departure from the rule is allowed. The general rule as laid down by Sir G. Lee, in *Hughes* v. *Cookson* (1), is that creditors, as such, have no right to call upon the next of kin to give justifying security. There is the other case about the same time and to the same effect, cited by Dr. Tristram: *Hickman* v. *Black*. (2) Such being the general rule, the only question is, whether there are in this case circumstances so strong as to induce the Court to depart from it. I think that there are not. I see nothing in the affidavits tending to shew that the estate is insolvent, as suggested. Nor is there anything tending to shew that the guardian of the infant is an unfit or improper person for the grant, or that her credit ought to be doubted. Independently of the circumstance of her age, there is nothing to shew that this lady is not perfectly fitted to have the administration. A case was cited by Dr. Spinks in support of his application, but that case turned on the circumstance that the guardian of the next of kin had renounced, and the question being, whether that renunciation might be retracted, the Court thought that it was not bound to allow it to be retracted. That case seems to me to have little in common with the present. I order that the administration issue to the guardian of the next of kin, and I make no order as to the sureties justifying.

Dr. Tristram asked that the defendants be condemned in costs.

SIR J. P. WILDE. I think they ought to pay the costs of this motion.

Proctors for plaintiff: *Fielder & Sumner.*

Proctors for defendants: *Deacon, Son, & Rogers.*

(1) 1 Lee, 386. (2) 2 Lee, 251.

BONE *v.* WHITTLE. *Nov.* 28.

Costs of unsuccessful opposition to Will—Contentious Rule 41.

If the party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by Contentious Rule 41, and the question of costs is left to the discretion of the Court.

An attesting witness to a codicil signed a written statement to the effect that it was not duly executed; and it was opposed upon that statement. The Court being of opinion that the statement had been unfairly obtained from the witness by the party opposing the codicil condemned her in the costs.

THE plaintiff propounded the will of her mother, Margaret Bone, widow. The defendant propounded a codicil revoking a bequest in favour of the plaintiff contained in the will. The plaintiff pleaded that this codicil was not duly executed. The issue was tried before Sir J. P. Wilde by a common jury, and the due execution of the codicil having been clearly proved, and no evidence being called for the plaintiff, the jury returned a verdict for the defendant, and the Court pronounced for the codicil.

One of the attesting witnesses admitted, on cross-examination, that she had signed a written statement to the effect that the codicil was not duly executed, but she said that the statement was not correct. Her explanation as to the circumstances under which she had signed it, was, that the plaintiff and a gentleman had come to her at a house where she was in a situation as a domestic servant, when she was busy about her work, and the plaintiff untruly told her that she had been sent to her by her former mistress, the plaintiff's sister, who had given an account of the execution of the codicil, which she repeated, and wished to know whether it was correct; that she told the plaintiff she had forgotten all about it; that the gentleman drew up the written statement, partly from what she said, and partly from what the plaintiff said, and she signed it, and then it was read over to her; and that when it was read over she made no objection to it, although it was not in accordance with what she had told them and with what actually took place, because she wanted to get rid of them, and she thought it was of no importance.

The plaintiff filed her plea on the 24th of January, 1866, and

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on the 12th of February her solicitor delivered the following notice to the defendant's proctors:

"We give you notice that, in the event of your examining as witnesses at the hearing of this cause both the attesting witnesses to the codicil dated the 6th March, 1863, and propounded by you, we do not intend to produce any witnesses other than the attesting witnesses to the will dated the 24th October, 1857."

Dr. Deane, Q.C. (*Staveley Hill* with him), for the defendant, moved that the plaintiff might be condemned in costs. The notice is not in the terms prescribed by the 41st Rule, and is apparently drawn up for the purpose of evading that rule. It does not, therefore, protect her from condemnation in costs.

Dr. Wambey, for the plaintiff. It is a fair and proper notice, and the object of it was to give the defendant warning that the plaintiff intended to rely on the evidence of one of the attesting witnesses. That witness having signed a statement that the codicil was not duly executed, the plaintiff was bound to have the facts investigated: *Ferrey* v. *King*. (1)

SIR J. P. WILDE. The object of the rule is very plain. It is to continue in this court the practice of the Prerogative Court, whereby a next of kin might call on the persons interested under a will to prove it per testes, without rendering himself liable to costs. In order that the person propounding a will may know what the next of kin intends to do, he must, if he means to take advantage of the rule, deliver the notice with his plea. It is unnecessary to consider whether the terms of the notice given in this case are substantially within the rule, because the notice was not given until long after the plea was filed, and the plaintiff therefore loses the benefit of the rule. The consequence is, that the matter, as in the case of *Ferrey* v. *King* (1), is left to the discretion of the Court, and that discretion will be exercised on a consideration of all the circumstances. If the plaintiff had contented herself with hearing what the witnesses had to say, and extracting by cross-examination the true account of the execution of the codicil, she would not be condemned in costs; but that is not at all the complexion of the case. The

(1) 3 Sw. & Tr. 51; 31 L. J. (P. M. & A.) 120.

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plaintiff having been excluded from the testatrix's testamentary bounty by a codicil entirely in the testatrix's handwriting, and appearing on the face of it to be duly executed, she presents herself to one of the attesting witnesses, telling her falsely that she had been sent by her former mistress, who had told her a long story about the execution, and asks her if the story is true, and gets her to sign a paper stating that the codicil was not duly executed. The Court cannot give its sanction to such a course of proceeding, and it will mark its sense of it by condemning the plaintiff in costs.

Solicitor for plaintiff: *H. B. Farington.*
Proctors for defendant: *Wadeson & French.*

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Nov. 15.

Desertion—Deed of Separation—Allowance by Wife to Husband after his Desertion.

After a husband had deserted his wife, he wrote to her asking for assistance to save him from starving, but he refused to return to her or to allow her to come to him. She consented to make him an allowance, and a few months after the desertion they both signed a deed of separation, whereby the payment of the allowance was secured to him. The deed was not carried into effect, but she paid the allowance to him for three months, and then stopped it, because she thought that by continuing the payment she was encouraging him to keep apart from her. She afterwards wrote and asked him to resume cohabitation, which he refused to do. More than two years having elapsed since the commencement of the desertion, she filed a petition:—

Held, that, as she never consented to his remaining apart from her, the desertion for two years and upwards was established.

2 P. M. 25. — 26. — 7

THIS was a petition by a wife for a dissolution of marriage on the ground of adultery coupled with desertion for two years and upwards. The respondent did not appear.

Dr. Spinks, and *Searle*, for the petitioner.

The petitioner was the daughter of a gentleman of property, who settled 10,000*l.* on her to her separate use on her marriage, which took place in March, 1852. The respondent was a physician, and for eighteen months after the marriage he practised at Bere Regis, in Dorsetshire. He then got into difficulties, and sold his

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house and furniture, and went on the Continent with the petitioner. After remaining abroad for two years, his father paid his debts, and they returned to England. From 1856 to 1861 he was in practice in Gloucester Street, Pimlico, where his wife lived with him. She stated that they had frequent quarrels about his extravagance, and that whilst she was on a visit to her mother at Bushey, in the summer of 1861, he pawned her jewels. In the beginning of August, 1861, she went with her mother to Boulogne with the consent of the respondent; and in the course of the month the respondent paid them a visit, and stayed for ten days. At the end of that time he said he had received a letter from his father calling him to London on particular business, but she did not see it, as all his letters were sent to another address, and he refused to shew it to her. It was arranged that she should stay for the month with her mother at Boulogne, and then return to Gloucester Street; and he went away, and she never saw him afterwards. She heard from one of his relatives that he had sold off the furniture in Gloucester Street, and gone abroad. She found that he had left Gloucester Street, and had sold the house and furniture; and her brother, at her request, made enquiries in the neighbourhood, but could not ascertain what had become of him. In the middle of September, 1861, she returned to England, and went to live with her mother at Bushey, where she stayed until her mother's death in July, 1862. She wrote to the respondent's father, but he refused to let her know his address. He sent a friend of his, named Wilson, to Boulogne for his clothes, but she could not ascertain his address from him. In the winter of 1861, she found out that he was living at Maidstone, and she wrote to him to know why he did not return to her. He wrote to her lawyer to say, that as his address was discovered, he should leave Maidstone, but he did not tell her where he should go. Mrs. Nott went on to say: "He wrote me most dreadful letters, and said he had not a coat to his back, and that he was starving, and that it would be a Christian act if I were to give him 1*l.* a week. By the advice of my brother, who is now dead, I agreed to do so. The respondent was not satisfied, and wrote me very abusive letters. I communicated with him through Mr. Wilson, and I never knew his address, as I thought he had left Maidstone. He gave me no

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reason for not living with me. After my mother's death I lived with my aunt at Notting Hill, where I have remained until the present time. In 1862, I signed a deed of separation. [This deed, which was signed by the petitioner and by the respondent, contained the usual recitals and covenants of a separation deed, and also a covenant for the payment of 1*l.* a week by the petitioner to the respondent.] After the respondent had signed, it was sent to my eldest brother, Thomas Marsden, who was to have acted as trustee; but he refused to sign in consequence of something he had heard as to the respondent's conduct. My brother and my brother-in-law, Mr. Clowes, who was an attorney, managed the whole affair for me. They are both dead. I paid the respondent the allowance for one quarter, and then I stopped it, because I was told that if I continued the payment, it would only induce him to stay away from me. I was desirous that he should come back to me, and in 1864 I wrote and asked him to do so. On the 21st of February, 1864, I received this letter from him. [In this letter, the respondent distinctly refused either to return to the petitioner, or to allow her to come to him.] I supposed that the reason why he would not return was that he was intriguing with some other woman; but I did not know it until the beginning of this year."

Evidence was given, that immediately after the respondent left his wife in 1861, he took lodgings at Maidstone under an assumed name; that he remained there until the beginning of 1866; and that, a few weeks after he arrived there, a woman stayed with him for several days, who passed as his wife and cohabited with him, and that she had visited him on subsequent occasions. A witness, at whose house in Maidstone he had lodged, said he always seemed to be in pecuniary difficulties.

THE JUDGE ORDINARY. The husband left the wife without the slightest notice, and went to live with another woman. If she had heard no more of him afterwards, there would have been a clear case of desertion. The only question in the case arises from the circumstance of her having afterwards made him an allowance and signed a deed of separation by which it was secured to him. The arrangement for the deed of separation fell through, and what occurred seems to have amounted to this: the husband was keeping out of

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the way, partly because he was afraid to shew himself on account of his creditors, and partly because he did not choose to return home; but being really in desperate circumstances, he wrote to his wife for assistance, and as he would not come home, she consented to let him have some money rather than that he should starve. There was nothing like an assent or agreement on her part to his staying away from her, and she has therefore made out a case of desertion. The adultery being also proved, I pronounce a decree nisi, with costs.

Solicitors: *Walter & Moojen.*

Nov. 20.

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IN THE MATTER OF BREMNER *v.* BREMNER AND BRETT.

Wife's Costs—Alimony—Lien of Wife's Attorney on her Alimony for Costs.

An attorney retained by a married woman in a matrimonial suit has a lien for costs incurred on her account, including costs disallowed on taxation as between her and her husband, but allowed as between attorney and client, upon all moneys received by him on her account in the course of the suit. This lien extends to alimony in the hands of the attorney.

THIS was originally a suit by a husband for dissolution of marriage. The respondent having answered traversing the charge of adultery and alleging that the petitioner had committed adultery, these issues were tried before the Judge Ordinary by a common jury, and a verdict was found that both the petitioner and the respondent had committed adultery. The petition was afterwards dismissed at the instance of the petitioner, and the wife's costs were ordered to be paid by the husband, together with arrears of alimony pendente lite. (1)

Nasmith moved (July 10) on behalf of the respondent, Sarah Bremner, for a rule calling upon Messrs. Lawrie & Keen, her solicitors in the suit, to shew cause why they should not pay over to her the sum of 53*l.* 11*s.* 7*d.*, the amount of alimony pendente lite remaining in their hands which they had received from the peti-

(1) *Bremner* v. *Bremner and Brett*, 3 Sw. & Tr. 378; 33 L. J. (P. M. & A.) 202.

tioner, together with the costs of the application. The motion was supported by affidavits of the refusal of Messrs. Lawrie & Keen to pay over the money on the ground that they claimed a larger sum from the respondent in respect of costs which had been disallowed on taxation as against the petitioner.

W. G. Harrison (July 17) shewed cause, in the first instance, against the rule on two grounds: first, that the application was a breach of faith, being contrary to an arrangement, entered into before Messrs. Lawrie & Keen undertook the case, between them and the respondent, to the effect that they were to retain any moneys received on her account to satisfy their claim against her for costs. [It is unnecessary to enter into the facts set out in the affidavits on both sides as to this ground, as the judgment renders them immaterial.] Secondly, Messrs. Lawrie & Keen, as the respondent's attorneys, have a lien for costs upon moneys received on her account.

There is a preliminary objection to the motion that if it is made in the suit of *Bremner* v. *Bremner and Brett*, there has been no order for a change of attorneys, and Messrs. Lawrie & Keen are the only attorneys who have any right to appear for her in that suit; whilst, if it is not made in the suit, she cannot make it unless her husband is joined. She cannot appoint an attorney without her husband, except for the purposes of the suit.

As to the general doctrine respecting an attorney's lien, *Wilkins* v. *Carmichael* (1), *Welsh* v. *Hole* (2), *Ex parte Games* (3), may be referred to. The question is, can the same relationship exist between a married woman and her attorney in matrimonial suits that exists between attorney and client in other suits, and is the doctrine of lien equally applicable to them? It is certainly for the interest of the married woman that it should be so, for if her retainer does not place her in the same relation to her attorney as any other suitor, and if she cannot bind her separate estate for costs incurred on her account, no attorney will undertake her case. She is not in the same position as an infant, who cannot contract; she can contract, but she cannot be made responsible in person for a breach of contract; she is only responsible in estate. *Owens* v. *Dickin-*

(1) 1 Dougl. 101. (2) 1 Dougl. 238. (3) 3 H. & C. 294.

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son (1), *Hulme* v. *Tenant* (2), *Murray* v. *Barlee*. (3) In *Clarkson* v. *Waterhouse* (4), a married woman was condemned in the costs of a testamentary suit. If a married woman can retain an attorney she must be subject to all the legal consequences of that act, one of which is the right of lien. The fact that she cannot be sued is a strong reason for maintaining that right. Alimony is always treated as a separate estate; and in *Braham* v. *Burchell* (5) Sir J. Nicholl seemed to be of opinion that a married woman might dispose of arrears of alimony by will. If the alimony belongs to the husband, the wife has no right to make the present application; but it is submitted that it does not, and that it is in every respect separate estate, and chargeable as separate estate, although the suit in which it was allotted is at an end.

[THE JUDGE ORDINARY. You are arguing the question as if the alimony had been paid by the husband into the hands of the wife, and she had taken it to her attorney and left it in his hands for the payment of her extra costs. But looking at the nature of this peculiar fund and the object of the Court in ordering its payment by the husband, has the attorney a right to intercept it before it reaches her hands?]

The Court is bound to protect its own officers, and it will allow the attorney to deduct from the alimony the costs fairly chargeable against the wife. Alimony is not a fund for providing her with meat, drink, and clothing only; it is for necessaries, and extra costs in a matrimonial suit may well be regarded as a necessary. Commissioners for taking acknowledgments of married women have a lien on the deeds for their fees: *Ex parte Grove*. (6)

There is another question, whether this Court has the same power as other courts to make orders as to costs, as between attorney and client. No doubt it has full power over costs, as between party and party: 20 & 21 Vict. c. 85, s. 51; but has it any power beyond what is given it by that section? [He also referred to 23 & 24 Vict. c. 127, s. 28.]

[THE JUDGE ORDINARY. I have no doubt that this Court has the same powers as other courts over the attorneys practising in it:

(1) 1 Cr. & Ph. 48.
(2) 1 Bro. C. C. 16.
(3) 3 My. & K. 209.
(4) 2 Sw. & Tr. 378; 29 L. J. (P. M. & A.) 136.
(5) 3 Add. Ecc. 243.
(6) 3 Bing. N. C. 304.

21 & 22 Vict. cap. 108, s. 15. As to your objection to the form of the application, there is no doubt that, whether it ought to be headed "In the Matter of an Attorney," or in the suit, it is in substance an application in the divorce suit by the client against her attorney. If she can appoint an attorney to conduct her suit, surely she can apply to the Court to exercise its power over that attorney in regard to the conduct of the suit, without joining her husband in the application.]

Nasmith, in support of the rule. The costs are a debt of the husband and not of the wife, and he, if any one, is liable for them.

[The Judge Ordinary. He is not liable in this Court for the costs now claimed by the wife's attorneys, because they have been disallowed on taxation.]

Alimony is not in the nature of separate estate. It is a part of the husband's income appropriated by order of the Court to a specific purpose, namely, the maintenance of the wife; and her attorney has no right to divert it from that purpose by applying it to the payment of extra costs. Her attorney is merely a trustee, who receives the money on trust to hand it over to her. [He cited *Huguenin* v. *Baseley* (1), *Hunter* v. *Atkins* (2), *Vansittart* v. *Vansittart* (3), Statute of Frauds, sec. 4 (4), *Tebbs* v. *Carpenter* (5), *Brown* v. *Ackroyd* (6), *Fyler* v. *Fyler* (7), *Barrow* v. *Barrow* (8), *Cheale* v. *Cheale* (9), *Mitchell* v. *Oldfield.* (10)]

Cur. adv. vult.

The Judge Ordinary. This was an application by the respondent to compel her attorney in the suit to pay over to her certain moneys which he had received by virtue of an order of this Court on her behalf as alimony from her husband. The fact was not denied, but the application was resisted on the ground, first, that she had virtually consented to his retaining the money to pay certain extra costs incurred on her behalf: and, secondly, that, whether she had made any such arrangement or not, the

(1) 14 Ves. 273; 2 W. & T. 435.
(2) 3 My. & K. 113.
(3) 4 K. & J. 62.
(4) 29 Car. 2, c. 3.
(5) 1 Madd. 290.
(6) 5 E. & B. 819.
(7) Dea. & Sw. 175.
(8) 5 D. M. & G. 782.
(9) 1 Hagg. Ecc. 374.
(10) 4 T. R. 123.

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attorney was by law entitled to a lien for such costs on money of hers that came to his hand in the suit.

On the first ground I am of opinion that the affidavits do not sufficiently substantiate any such understanding as that alleged. On the second, the Court derived great assistance from the able argument of Mr. Harrison in favour of the lien, with which it is prepared to concur.

The general proposition is not doubted, that an attorney has a lien for his costs upon money received by him on his client's behalf in the suit. The contention on the other side was—first, that there could not be a lien without a debt, and that a married woman could not be liable for a debt; and next, that alimony was subject to peculiar considerations as an allowance enforced by the Court for the special purpose of maintaining the wife during the suit, and ought not to be allowed to be diverted, or rather intercepted in satisfaction of other claims. The conclusions drawn from the position of a married woman at common law in regard to debt appeared to me to be too wide. The exceptions to the immunity of the wife, if she has any separate property, are numerous; and, although it has been held in *Vandergucht* v. *De Blaquiere* (1) that a court of equity will not interfere with the payment of alimony as separate property, it does not follow that in this court the considerations which attach to separate estate may not to some extent be applied to it. It is obvious that whatever the position of a wife at common law may be, it has been modified in this court by the very fact of permitting her to sue and be sued by her husband. Now the money on which the lien is claimed is money received in a suit thus instituted, which in its very inception is contrary to the first principles attaching to the status of feme covert at common law.

I am of opinion that if a married woman may sue or be sued, she may employ an attorney, and that if she does so the ordinary rules by which the relation of attorney and client is regulated must attach to her—at least in this court. The attorney's lien would therefore be good, unless an exception can be maintained in respect of alimony. And I am of opinion that it cannot. It is true this money is paid to maintain the wife; but it is equally true that,

(1) 5 My. & Cr. 229.

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unless at the desire of the wife, which is according to the present practice of the Court required to be expressed in writing and signed by her, the money is always made payable to herself alone. (1) If she chooses to allow it to pass into the hands of her attorney for her own convenience or otherwise, the ordinary consequences must follow, and the Court cannot interfere. The application will therefore be rejected, with costs.

Solicitor for respondent: *A. J. Miles.*

Solicitors for respondent in the suit: *Lawrie & Keen.*

MACARTNEY *v.* MACARTNEY.

Nov. 7.

Practice—Proof of Bigamy by Affidavit.

If a respondent has been convicted of bigamy, and the witnesses to prove his bigamy reside at a distance, and cannot be produced without considerable expense, the Court will permit such bigamy to be proved by affidavit.

THIS was a wife's petition for dissolution of marriage on the ground of adultery, coupled with bigamy. The respondent did not appear.

Nov. 6. *Dr. Spinks* moved for directions as to the mode of trial. He read an affidavit that the husband had been tried and convicted of bigamy, and was undergoing a sentence of imprisonment. He asked for an order that the bigamy might be proved by affidavit instead of oral evidence, and said that the Court had made such an order under similar circumstances, although he was not aware that any such case had been reported.

THE JUDGE ORDINARY. I am reluctant to dispense with oral evidence in suits for dissolution, but I will consider the matter.

Cur. adv. vult.

THE JUDGE ORDINARY. I will grant the application upon an affidavit being filed that the witnesses reside at a distance, and that the expense of the suit will be considerably increased if they are produced in Court.

Solicitor for petitioner: *J. B. Batten.*

(1) Rule 94. 1 Ir. R. 34.

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Dec. 11.

CHARLES *v.* CHARLES.

Permanent Maintenance—20 & 21 Vict. c. 85, s. 32.—Petition presented after decree nisi—Rules and Orders made by the Judge Ordinary alone—Rule 96 —Practice. (1 W. R. 34)

P. M. 341
346, 350,

The Judge Ordinary has power to make and to alter or revoke rules and orders concerning the practice and procedure of the Court, without the concurrence of the other judges.

A petition for an order for permanent maintenance, under the 32nd section of the 20 & 21 Vict. c. 85, must be presented, in accordance with the 96th rule, after the decree nisi, and before the decree absolute; and the 98th rule, which requires the respondent to file an answer to it on oath, is a binding rule with which the Court will not dispense except upon special grounds. The fact that it appears on the face of the petition that the petitioner has a separate income, is not a ground on which the Court will dispense with that rule.

A DECREE NISI dissolving the marriage had been pronounced in this case, at the prayer of the wife, on the ground of the husband's adultery, coupled with cruelty. After the decree nisi, and before the decree absolute, the petitioner presented a petition praying for an order for permanent maintenance under the 32nd section of the 20 & 21 Vict. c. 85. The respondent filed an answer on oath to this petition in the following terms:

"I admit it to be truly alleged in the said petition that on the 14th day of June, 1866, a decree nisi for the dissolution of the marriage between the said petitioner and myself was pronounced by this honourable Court, and I submit that by reason thereof this honourable Court cannot now, after such decree, order me to secure or pay to the said petitioner any sum or sums of money, and that I cannot be called upon to answer the said petition further or otherwise."

Searle moved that the respondent might be ordered to file a fresh answer. It has been the invariable practice of the Court to make orders, under the 32nd section, part of decrees absolute, and the 96th rule expressly directs that petitions for such orders are to be presented after the pronouncing of decrees nisi and not before.

Dr. Spinks, for the respondent. It is apparent, on the face of the petition, that the respondent ought not to be ordered to answer it, inasmuch as it shews that the petitioner is possessed of a sufficient separate income. The petition is presented in accordance

with the 96th rule of 1866, but I submit that the rules and orders of 1866 are invalid, having been made by the Judge Ordinary alone, and not by the Judge Ordinary and the other members of the Court, as were the rules and orders which they repealed. Under the 20 & 21 Vict. c. 85, s. 53, the full Court alone had power to make rules and orders; and the 1st section of the 23 & 24 Vict. c. 144, does not confer that power upon the Judge Ordinary. That section applies only to the power to "hear and determine" all matters arising in the Court, and has no reference to the power of making rules and orders. The Probate Act of 1857 (20 & 21 Vict. c. 77, s. 30) expressly enacts that the rules and orders for regulating the procedure of the Probate Court are to be made by the judge of the Court, with the concurrence of the Lord Chancellor and the Lord Chief Justice of the Queen's Bench, and it is not likely that the legislature would confer a power upon the Judge Ordinary, who is only one amongst many members of this Court which it has not conferred on the judge of the Court of Probate, who is the sole member of that Court.

The order under the 32nd section is to form part of the decree dissolving the marriage, and that is the decree nisi and not the decree absolute. The practice of the Court is erroneous, and ought to be altered.

Searle. The question now before the Court is, not whether the petition requires an answer, but whether the Court has power to order the respondent to answer it. Any objection to the petition should be raised in another form.

Under the 20 & 21 Vict. c. 85, ss. 9 and 53, the Judge Ordinary alone had full power, although he did not choose to exercise it, to make rules and orders without the concurrence of the other judges. The expression "the Court" is used indifferently throughout the act for the full Court, and for the Judge Ordinary sitting alone, and in the 53rd section, reading it in connection with the 9th section, it appears to mean the Judge Ordinary. But whatever doubt may be suggested as to the construction of that section, it is clear that the 1st section of the 23 & 24 Vict. c. 144, gives the Judge Ordinary power to make rules and orders, for he is not only to "hear and determine all matters arising in the said court," he is also to "exercise all powers and authority whatever

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which may now be exercised by the full Court, or by three or more judges of the said Court."

The 96th rule is in accordance with the practice of the Court ever since the act was passed which introduced rules nisi (see *Fisher* v. *Fisher* (1)), and it has recently received the sanction of the full Court in *Sidney* v. *Sidney* (2), where it was held, that as an order under the 32nd section must form part of the decree absolute, the appeal from such an order lay not to the full Court but to the House of Lords.

THE JUDGE ORDINARY. This application for an order upon the respondent to file a further answer on oath to the petition for permanent maintenance is resisted, first, on the ground that, although such an order would be in accordance with the rules and orders of the Court now in force, the Judge Ordinary alone had no power to make those rules and orders. I think it does not follow that even if the Judge Ordinary had no power to make rules and orders, this motion ought not to be granted; but I proceed to consider that objection.

When this Court was first constituted, it consisted of the Judge Ordinary and of several other judges of the courts of equity and common law, and the main duties devolving on it had to be discharged by the full Court. Certain subordinate duties were confided to the Judge Ordinary alone, but he was not intrusted with the power of dissolving marriages; and suits for dissolution, which form the bulk of the business of the court, were heard and determined by the full Court. Then came the Amendment Act by which all the puisne judges of the common law courts were added to the Court, but it was still the full Court alone which had the power of dissolving marriages. Whilst these acts remained unaltered, rules and orders were made from time to time, when it was necessary to make them, by the full Court. I think there is a good deal in the suggestion, that by the strict letter of the law the Judge Ordinary alone might have made rules and orders under the 53rd section; but such a power, if it existed, would never in the nature of things be exercised; for whilst the Judge Ordinary was only a subordinate member of the Court, to whom its inter-

(1) 2 Sw. & Tr. 410. (2) Law Rep. 1 P. & M. 78.

locutory business, but not its main business, was confided, he could never have thought it desirable to issue rules and orders on his own authority. The body of judges who had to transact the main business of the Court, was obviously the proper authority to make rules and orders for the regulation of the practice of the Court, and accordingly all rules and orders were made by the judges of the full Court, or a majority of them, up to 1860, when the 23 & 24 Vict. c. 144 came in force. The question is, what is the meaning of the 1st section of that statute? Was the power of making rules and orders for the government of the practice of the Court one of the powers which had up to that time been exercised respectively by the full Court, or three or more judges thereof? Unquestionably it was one of the powers of the Court, and one which up to that time had necessarily been exercised by the body of the Court, and the terms of the statute are most distinct that "It shall be lawful for the Judge Ordinary alone to hear and determine all matters arising in the said Court, and to exercise all powers and authority whatever which may now be heard and determined and exercised respectively by the full Court." I should regret taking a wrong view of the meaning of this section, and I can quite appreciate the force of the suggestion, founded upon the provision for the making of rules and orders in the Probate Act, as to the probability of the intention of the legislature being that they should be submitted to some of the other judges; but, according to my apprehension, the legislature has not directed that course to be taken. The question was one for the legislature to determine, and it has determined it. It has conferred on the Judge Ordinary all powers whatever exercised by the full Court. The following section contains a provision reserving the power of appeal to the full Court. The power of appeal is therefore the only power of the full Court reserved by that statute. With regard to the discretion of the Judge Ordinary in the exercise of the power of making rules and orders, it appears to me that as long as the common law judges took an active part in the transaction of the business of the Court, it was reasonable and right that they should assist in framing the rules and orders for the regulation of its practice and procedure; but after they ceased to exercise the powers of the Court, and to take any part in its pro-

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ceedings, except for purposes of appeal, it was useless to ask them to investigate questions of practice and to give their sanction to rules with which they had no longer any immediate concern. On these grounds, I think the statute gives the Judge Ordinary the necessary power to make rules and orders, and that he could not properly cast the responsibility of making them on the common law judges.

I had supposed that Dr. Spinks also meant to contend that the Court had no power to make a rule ordering a party to give an answer on oath to a petition for permanent maintenance, but the answer to that argument would be, that the original rules and orders contain a similar provision as to answers to petitions for alimony. (1)

I now pass to the next question, which is also well worthy of consideration, namely, whether the power given to the Court by the 32nd section ought to be exercised at the time when the decree nisi is pronounced, or at the time when that decree is made absolute. The words of the section are: "The Court may, if it shall think fit, on *any such decree*, order," &c., that is, on the decree referred to in the previous section, namely, a decree "declaring such marriage to be dissolved." At the time when the act was passed there was no such thing as a decree nisi, but by the 23 & 24 Vict. c. 144, s. 7, it was enacted that every decree for a divorce should, in the first instance, be a decree nisi, not to be made absolute until after the expiration of a certain time. This alteration having been made in the system established by the original act, the question arose whether the provisions contained in the 32nd section of the original act were applicable to the decree nisi or the decree absolute. Now, the sense and convenience of the matter certainly point to the decree absolute. Before the Court can order that the husband shall secure to the wife such sum of money "as, having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it shall deem reasonable," it must inquire into the fortune of the wife, and the ability of the husband. It must, therefore, take one of two courses. It must either suspend the decree nisi after the petition is proved until that inquiry has been gone into, or it may make

(1) Rule 26 of 1858. 4 Jur. (N.S.) W.R. 58.

the decree nisi at once, and go into the inquiry before the decree is made absolute. The latter is so obviously the most convenient course, that, if there is any doubt on the matter, the Court ought to adopt it, for it should so read the statute as to render it as useful as possible to the suitors. And no doubt that is the course which has been taken by the Court ever since the statute passed, and it was sanctioned by the full Court in the recent case of *Sidney* v. *Sidney*. (1) I have no doubt that the practice of the Court carries out the intention of the legislature, and that "any such decree" in the 32nd section means the decree finally dissolving the marriage, and not the decree nisi.

The only remaining question is, whether this is a case in which the husband ought to be ordered to file an answer upon oath. Rule 98 is a binding one, and I think the order is one which the Court ought to make, unless there are some special circumstances which justify a departure from the usual course. It is said that in this case the order ought to be refused, because it appears on the face of the petition that the wife has an income of her own. But that is not a sufficient ground, for, until the respondent files his answer, the Court does not know how large his income may be. It is very likely that some of the matters on which information is sought may be within the cognisance of the petitioner, but the question is one of practice. The Court must find out somehow or another what is the ability of the husband and the fortune of the wife, before it can act on the statute. What is the readiest means of obtaining that information? Why, first, hearing what the wife has to say, and then looking at the husband's answer on oath, subject, if need be, to correction by other witnesses. That practice is entirely in conformity with the practice of the Court as to the allotment of alimony pendente lite, and as to other matters in which the statements of parties are required to be verified by their oaths. I therefore order the respondent to file a further answer on oath to the petition within a week.

Order accordingly.

Solicitor for petitioner: *Duignan.*
Solicitor for respondent: *Needham.*

(1) Law Rep. 1 P. & M. 78.

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Dec. 18.

WOOD *v.* WOOD AND HUTCHINS.

Practice—Rule 28—Time for appearing—Motion as to Mode of Trial.

If a respondent does not enter an appearance within the time (generally eight days) named in the citation, the petitioner can move for directions as to the mode of trial without waiting for the expiration of the time (twenty-one days) allowed by the 28th Rule for filing an answer.

THIS was a petition by a husband for dissolution of marriage. The service of the citation and copy of the petition was on the 30th of November, and the affidavit of search and non-appearance of the respondent and co-respondent was sworn on the 12th of December.

Inderwick moved for directions as to the mode of trial. The application is perhaps premature, inasmuch as the 28th Rule allows twenty-one days after appearance for filing an answer. (1 W.R. 32)

THE JUDGE ORDINARY. The citation calls on the respondent to appear within eight days. If there is no appearance entered within that time, I think the petitioner is not bound to wait for the expiration of twenty-one days before moving for directions as to the mode of trial. Rule 28 applies only to cases where an appearance has been entered.

Directions were accordingly given as to the mode of trial. (1)

Solicitor: *Scaife.*

(1) See *Child* v. *Child*, 3 Sw. & Tr. 537; 33 L. J. (P. M. & A.) 156. This case was not brought to the notice of the Court. Rule 14 of the first Rules and Orders which were in force when *Child* v. *Child* was decided, corresponds with Rule 28 of the Rules and Orders now in force, but they are differently worded.

(Also 4 Jur. N.S. 92. 59.

IN THE GOODS OF BARBER. 1866

Lost Will—Probate of Draft granted on Motion. *Nov.* 6.

As a general rule, the Court requires the draft or copy of a lost or destroyed will to be propounded before admitting it to probate; but where satisfactory evidence was given of the contents of a destroyed will, of its due execution, of its existence at the time of the testator's death, and of its subsequent destruction, the persons interested under it, and the persons in whose custody it was, not being in any way to blame for such destruction, the Court, with the consent of the only persons interested in the event of an intestacy, granted probate of a draft, on motion.

WILLIAM BARBER, late of Rawmarsh, in Yorkshire, farmer, died on the 29th of March, 1866. On the 23rd of March, 1866, he duly executed a will, leaving all his property to his wife, Alice Barber, absolutely, and appointing his wife and John Fisher executors. This was an application for probate of a draft of the will, the original having been destroyed. The affidavits filed in support of the motion proved the following facts: That in 1865 the will had been prepared and engrossed for execution by Richard Thompson, the managing clerk of J. Badger, the testator's solicitor, from instructions given to him by T. Neatby, the testator's brother-in-law; that T. Neatby had received these instructions from the testator; that on the 22nd of March, 1866, the testator being then seriously ill, T. Neatby fetched the will from J. Badger's office, and on the 23rd of March took it to the house of the testator; that it was read over to him by Mr. Fisher in the presence of T. Neatby, and other persons; that he then asked Mr. Fisher to act as executor with his wife, and Mr. Fisher consented; and that Mr. Fisher then made a pencil alteration in the engrossed draft, appointing himself the second executor, and also added the date, which had been left in blank, in pencil; that Mr. Fisher then made a copy of the engrossed draft, with the pencil alterations, and such copy was duly executed by the testator, the attesting witnesses being T. Neatby and Elizabeth Philips; that the testator then handed the will for safe custody to T. Neatby, who retained it in his possession until the testator's death, after which he handed it to Thompson, in order that it might be proved; that Thompson,

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after reading it over, locked it up in a cash-box, containing other valuable documents, and some money, and deposited the cash-box in an iron safe; and that Thompson saw it for the last time in the cash-box on the 28th of May, 1866; that on the 29th of May it was found that the iron safe had been broken open, and the cash-box stolen; that it was afterwards discovered that it had been stolen by a junior clerk in Mr. Badger's office, named Oxley, and Oxley made an affidavit stating that he had burnt all the documents he found in the cash-box. All the witnesses who had seen the will or heard it read proved that it was in the same words as the engrossed draft with pencil alterations. The only next of kin of the testator and person entitled in distribution was a brother, who had died intestate, since the death of the testator, and his widow and only son had filed a proxy of consent to this application.

Searle moved for probate of the engrossed draft with the pencil alterations to the executors.

SIR J. P. WILDE. The circumstances disclosed are such as to leave no reasonable doubt on the mind of the Court that the will was duly executed, and that it was destroyed without the slightest fault or negligence on the part of those whose duty it was to take charge of it. Further, the next of kin consent to the application which is now made. Under these circumstances, I grant probate of the draft without calling on the executors to propound it; but as the copy from which the will was made has in its present condition the names of the attesting witnesses in pencil, and they have been struck through, the probate will be of the paper as it stands with the pencil alterations, but without the obliterations.

Proctors: *Fielder & Sumner.*

IN THE GOODS OF WILSON. 1866.
Nov. 6.

Will—Execution—Position of Names of Witnesses—Attestation.

1 P.D. 434

A testamentary paper is not entitled to probate, unless the Court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature.

Where, therefore, a will was written on one page of a foolscap sheet of paper, and the testator's signature appeared at the end of that page, with the words—Witness, William Hatton, and the names of three persons were subscribed, under a memorandum not testamentary, at the top of the second page of the same sheet, the Court came to the conclusion that, from the position of the three names and the circumstances of the case, they were not placed there for the purpose of attesting the will, and therefore pronounced the execution to be invalid.

JOHN WILSON, of Sheffield, died on the 14th of December, 1856, leaving a testamentary paper dated the 19th of October, 1850, commencing, "19th Oct., 1850. The last will and testament of Jno. Wilson, &c. After my death I will that my property and effects shall be sold and equally divided as follows, and for that purpose I nominate the following persons: Wm. Parker, Benjamin Littlewood, and Wm. Darley, all of Sheffield." He then gave the residue of his property to his three sons. The will ended at the bottom of the first page thus:

"John Wilson.

Witness, William Hatton."

At the top of the next page were these words:

"Leasehold property.

A cottage situate in George-street, in the parish of E——, in the county of York;" and beneath were three signatures:

"Wm. Parker,
Benjamin F. Littlewood,
William Darley."

Parker died in 1854, Darley in 1855, and Hatton in 1860. B. F. Littlewood deposed that the deceased executed the will by signing his name at the end of the first page of the sheet of foolscap, on which it was written in the presence of William Hatton; himself (the deponent), William Parker, and William Darley, the other trustees, all being present at the same time, to the best of his recollection and belief; and that they thereupon attested and

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subscribed the said will in the presence of the said testator, to the best of his knowledge and belief, by the said William Hatton signing his name at the foot or end of the first page of the second sheet of paper, and by the others signing their names at the end of the memorandum headed "Leasehold property," at the top of the second page. He further stated that he was seventy-two years of age, and that from the long time that had elapsed since the date of the will, and from his defective memory, he could not depose to the facts and circumstances attending the execution of the said will with more certainty and particularity than as aforesaid. A representation to the deceased was now required, to make out a title to the real estate about to be sold.

Dr. Spinks moved for probate of the paper. The signatures of the attesting witnesses are not required by the Wills Act to be at the foot of the will, therefore their signatures on the second page will suffice, if the Court is satisfied that they were put there in attestation of the testator's signature. The recollection of the only surviving witness as to what took place when he subscribed his name is very imperfect, but the Court will presume omnia rite esse acta: *Vinnicombe* v. *Butler*. (1) All the signatures are in the same coloured ink, and were probably written at the same time.

[PER CURIAM. The body of the will and the memorandum is in black ink, and all the signatures are written in blue ink.]

SIR J. P. WILDE. The 9th section of the Statute of Wills prescribes how a testator is to execute a will, and that the witnesses shall attest and subscribe the will in the presence of the testator. Now, from this it is plain that in order to make a good execution the witnesses must have attested and subscribed the will. They must attest the signature of the testator to the will. It is said that the position of the names of the witnesses is immaterial, provided they are in such a position as to shew that they were placed there for the purpose of attesting the will. In considering whether persons have subscribed a will as attesting witnesses the position of the signatures may be most material. If they are written under an attestation clause no difficulty arises, but if they are placed elsewhere their position may be important, because if they are placed under a particular clause or statement the inference is that

(1) 3 Sw. & Tr. 580; 34 L. J. (P. M. & A.) 18.

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primâ facie they were put there to give effect or to testify to the words of the clause or statement. The difficulty I have in this case is this: After looking at the paper itself is it possible to hold that the names of the three last witnesses were placed there for the purpose of attesting the will? The will is written on one side of a sheet of foolscap; at the foot of the first page there are these words, "Witness" (not witnesses), "William Hatton." There is no other name until you turn over the page, when there appear the names of three persons, written underneath a memorandum relative to some leasehold houses. The memorandum is "Leasehold property, a cottage situate in George Street, in the parish of Ecclesshall Bierlow, in the township of Sheffield, in the county of York," and the three names are the names of the three persons appointed as trustees of this property in the will. If these names appeared at the top of the page, it might have been supposed that they were put there for the purpose of attesting the will. But we find this memorandum and these names written under it, very probably because they are to become trustees of the property to which the memorandum relates. They probably signed for the purpose of giving their assent to the acceptance of the trust; but whatever may have been their motive for attesting the memorandum, it does not appear that they were placed there in order to attest the deceased's signature to the will. Then we come to the parol evidence, and here I cannot help observing that, although the testator died in 1856, application for probate of this will, which is dated 1850, is not made until 1866. Parker and Darley died in the lifetime of the testator, William Hatton died in 1860, and so there is now after this lapse of time only one witness alive, and what he can say is of the vaguest description; what he can say is merely to the best of his knowledge and belief; indeed he admits that in consequence of the long time that has elapsed, and from defect of memory, he cannot depose to the facts and circumstances attending the execution with certainty or particularity. In reality this witness adds little light to the transaction, and does not contradict the obvious circumstances as they appear on the face of the paper. I must refuse probate of the paper.

Probate refused.

Proctors: *Fielder & Sumner.*

1866
Nov. 7.

BOUVERIE AND LEFEVRE *v.* MAXWELL.

*Administration granted in Ecclesiastical Courts—Inventory and Accounts—Jurisdiction—*20 & 21 *Vict. c.* 77, *s.* 87—21 & 22 *Vict. c.* 95, *s.* 15.

The Court has no jurisdiction to compel administrators, who have taken out administration in an ecclesiastical court, to file inventories and accounts in the registry of the court. Such inventories and accounts are still, by virtue of the 87th section of the Probate Act, 1857, returnable only into the Court of Chancery. But the Court will grant a rule nisi to shew cause why a bond given in the ecclesiastical courts should not be assigned for breach of the condition without further proceedings, on being satisfied on affidavit that no inventory and account has been returned into the Ecclesiastical Court or into the Court of Chancery.

THE plaintiffs were considerable creditors of the estate of the Rev. Henry Baron Farnham, the deceased in this cause, under twelve post obit bonds, assigned to them, payable on the expiration of twelve months from the happening of certain contingencies, which happened in September, 1838. The deceased died in October, 1838, and in April, 1839, the defendant took out administration to his estate, sworn under 6000*l.*, in the Prerogative Court of Canterbury, giving a bond, with the usual condition, to exhibit a true and perfect inventory in the registry of the Court before the last day of September, 1839, and to render a true account before the last day of March, 1840. The defendant had failed to comply with the condition of the bond in both respects, and had satisfied no portion of the claim of the plaintiffs.

On the 13th of June, 1866, a citation was extracted by the plaintiffs against the defendant, commanding him, within eight days from the service thereof, to bring into the principal registry, upon oath, a true and perfect inventory of the deceased's estate, and to render a just account of his administration. The defendant appeared to this citation, under protest, and filed a petition, alleging—first, that the administration, whereof the plaintiffs now demanded an inventory, was made before the commencement of the act 20 & 21 Vict. c. 77; secondly, that the Court of Probate had no jurisdiction therein, because it was enacted by the 87th section of the said act, that all inventories and accounts in respect of grants of probate and administration made before the commencement of the said act,

should be returnable to the Court of Chancery. The plaintiffs, by their answer to this petition—first, denied that the Court of Probate had no jurisdiction herein, as in the said petition alleged, for that after the passing of the Probate Act (1857), the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), was passed, and came into operation on the 2nd day of August, 1858, and that by the 15th section of the last-mentioned act, it was enacted, that bonds given to any archbishop exercising jurisdiction in respect of grants of letters of administration made prior to the 11th of January, 1858, should enure to the benefit of the judge of the Court of Probate, and if necessary should be put in force in the same manner and subject to the same rules as if they had been given to the said Court subsequently to that day; secondly, they pleaded the condition of the administration bond; and thirdly, alleged that the defendant had not exhibited or caused to be exhibited in the said Prerogative Court of Canterbury, or in the Court of Chancery, or in the Court of Probate, an inventory of the goods, chattels, and credits of the said deceased; nor had he administered the same according to law, nor had he rendered a true account of his administration, in accordance with the condition of his said bond, and had, therefore, rendered himself liable to the jurisdiction of this Court herein.

The facts of the case were verified by an affidavit.

Dr. Tristram, for the plaintiffs. It was decided in *Young* v. *Hughes* (1) (see also *Young* v. *Oxley* (2)) that the Court of Probate was precluded (by the 87th section of the Probate Act) from exercising any jurisdiction in reference to inventories and accounts, and administration bonds in respect of grants made by the ecclesiastical courts, and that such jurisdiction was by that section vested in the Court of Chancery. This was considered a defect in the act, and to remedy it, the 15th section of the Probate Act, 1858, was enacted, by which administration bonds given in the ecclesiastical courts, are to enure to the benefit of the judge of this Court, and to be put in force in the same way and subject to the same rules as if they had been given to the judge of this Court. From the use of the word "enure" and the other expressions of this section, the Court has now the same jurisdiction to enforce

(1) 28 L. J. (Ex.) 161. (2) 1 Sw. & Tr. 25.

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compliance with the condition of this bond, one of which was to render an inventory and account, as well as to do all acts necessary to assign it, as if it had been given since the establishment of the Court; and, if so, the citation was rightly issued. If it had been intended to limit the operation of the section to the assignment of the bond, the word "assign" would have been used, as in the 83rd section of the Probate Act.

[SIR J. P. WILDE. When a person takes administration there are two distinct obligations imposed on him—one by his oath, by which he swears he will render an inventory and account, and the other by his bond, under which he binds himself to do the same thing. Is it not in execution of the first obligation that the Court orders an inventory, and quite irrespective of his liability under the bond? The first statute seems to hand over the duty of enforcing the obligation of the oath to the Court of Chancery, whilst the second statute deputes to this Court the duty of assigning, if necessary, the bond. What is the plaintiffs' object in this suit?]

This citation was extracted as preliminary to an application for the assignment of the bond. It was a rule of the Prerogative Court not to assign a bond for a breach of condition in respect of inventories and accounts until a citation to render the same had issued: *Crowley* v. *Chipp.* (1)

Dr. Spinks, for the defendant. By section 87 of the first act inventories and accounts in such cases as the present are returnable only into the Court of Chancery, and this provision has not been repealed directly or indirectly. This Court has ordered many bonds to be assigned, in order to be sued upon on a primâ facie breach in some form being shewn.

[SIR J. P. WILDE. If the object of the citation is merely to give the defendant an opportunity of shewing that he has not committed a breach of the condition of the bond, it is substantially the same thing as moving for a rule nisi to shew cause why the bond should not be assigned.]

SIR J. P. WILDE. It may not be easy to say what may have been the intention of the legislature in enacting the 87th section,

(1) 1 Curt. 456.

but there is no difficulty in determining what the legislature has done. By s. 87 of 20 & 21 Vict. c. 77, a distinction is drawn between the duties imposed upon an executor or administrator by his personal oath, and, as regards the administrator, by the obligation of the bond; and the enforcement of the duties as they relate to inventories and accounts is transferred to the Court of Chancery. The section says: "All inventories and accounts in respect of grants of probate and administrations made before the commencement of the act shall be returnable into the Court of Chancery, and all bonds taken in respect thereof shall be enforced by or under the authority of the Court of Chancery at the discretion of the Court." By this section, therefore, an alteration was made in the obligation; for whereas before this statute, the administrator on taking a grant of administration by his oath, and also by the condition of the bond, was required and undertook to return an inventory into the registry of the Prerogative Court of Canterbury, by this section it is required that the inventory and account shall be returned into the Court of Chancery, and there is nothing in the subsequent enactments repealing this requirement.

By 21 & 22 Vict. c. 95, s. 15, it is enacted "that a bond which had been given to any ecclesiastical court before the commencement of the Probate Act shall enure to the benefit of the judge of the Court of Probate, and, if necessary, shall be put in force in the same manner and subject to the same rules as if it had been given to the judge of the said Court." Therefore, without altering the new obligation created as to returning inventories and accounts into the Court of Chancery, the legislature provided that bonds which had been given to secure the due performance of the duties of administrators should be enforced by this Court. This Court may then enforce these bonds according to the powers given in the 83rd section of 20 & 21 Vict. c. 77. It may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order the registrar to assign the same. What the Court has to do is to entertain a motion ex parte, in the first instance, to shew cause why the bond should not be assigned, and before granting the motion it will require to be satisfied that primâ facie there has been a breach of the condition of the bond. If the breach to be

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alleged is that no inventory and account has been returned into the Prerogative Court, it will be borne in mind that the original condition of the obligation has been destroyed by the 87th section, and another substituted for it, viz. to return them into the Court of Chancery; so that this Court will have to ascertain whether such an inventory and account has been returned into the Court of Chancery. The Court will, in fact, consider whether the obligation of the bond, as modified by the Probate Act, has been broken, and whether an inventory has been returned into the Court of Chancery. Under the law of the Ecclesiastical Court a party must have been cited to exhibit an inventory before application could have been made for a bond to be assigned; but since the passing of the 87th section of the first Probate Act there is no obligation in respect of grants made before the passing of the act to bring inventories and accounts into this court, but there is such obligation to return them into the Court of Chancery. It is not easy to account for this provision, why such a rule should have been laid down, that in case of grants made the day before the act passed the inventories should be returned into the Court of Chancery, and in those made the day after, here; but so it is. The construction is clear. I think the protest must be sustained. I have no jurisdiction to order a person who took administration before the commencement of the Probate Act to bring an inventory into the registry of this court. But I have no objection to grant a rule nisi to shew cause why the bond should not be assigned on these affidavits, unless it is desired on behalf of the plaintiffs to bring in a further affidavit.

Protest sustained, with costs.

Solicitor for plaintiffs: *T. E. Weston.*
Proctor for defendant: *E. W. Crosse.*

DUNN *v.* DUNN. 1866
Nov. 7.

Will—Original execution—Alleged re-execution with Residuary Legatee as Attesting Witness—Presumption of re-execution rebutted.

A. duly executed a will in 1837, appointing B., her nephew, an executor and residuary legatee. On the 20th of May, 1861, being desirous to deliver the will and her deeds to B. for safe custody in the presence of a witness, C. was sent for, and in his presence she delivered the will and deeds to B., saying she wished him to be a witness to such delivery. Before the delivery she subscribed her name at the foot of the will, and C. and B. subscribed theirs, the latter with the prefix of the word "executor." A. gave no reason for signing her name, and said nothing to B. and C. about being witnesses to her will:—

Held, that what took place on the 20th of May, 1861, was not a re-execution of the will, and that the will was entitled to probate by virtue of the original execution.

Mary Dunn, late of Folkestone, in the county of Kent, died on the 20th of December, 1865, leaving a will dated the 24th of August, 1837, which was duly executed to pass real estate, by which she devised and bequeathed all her real and the residue of her personal property to Thomas Dunn, jun., her nephew, the plaintiff, appointing him one of her executors.

The defendant, Thomas Dunn, sen., the father of the plaintiff, contended that the will was executed on the 20th of May, 1861, and that the plaintiff and R. Fowle, whose names were subscribed at the foot of the will, were witnesses to such re-execution, so as to make the devise and residuary bequest to the plaintiff lapse, and devolve upon him as the sole next of kin and heir-at-law of his sister, the testatrix.

The original will was written on one page, and at the end the signatures were placed in the following positions:

"Signed, sealed, published, &c., in the presence of us, Edward Hopkins, Elizabeth Stone, George Stone, Executor, Thomas Dunn."

Mary Dunn,
20th May, 1861, Mary Dunn.

R. Fowle,

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The plaintiff in his declaration propounded the will as having been duly executed in 1837 so as to pass real estate, and then alleged, "that subsequently to the due execution of the said will, to wit, on or about the 20th day of May, 1861, the said testatrix delivered over the said will to the said Thomas Dunn for safe custody, and that on such occasion the further signatures, words, figures, and letters now appearing at the end of the said will, to wit, '20th of May, 1861, Mary Dunn' (written immediately underneath the original signature of the said testatrix); 'Executor, Thomas Dunn, R. Fowle,' were written on the said will for the purpose of witnessing the delivery of the said will to the said Thomas Dunn, and that such signature, words, letters, and figures form no part of the said will of the said deceased, and were not entitled to probate."

The defendant by his plea denied that the further signatures, words, figures, and letters now appearing at the end of the said will, to wit, "20th of May, 1861, Mary Dunn" (written underneath the original signature of the said testatrix); "Executor, Thomas Dunn, R. Fowle," formed no part of the said will, and were not entitled to probate as alleged in the declaration; for he said that on the 20th day of May, 1861, the testatrix, Mary Dunn, having a mind and intention to re-execute and re-publish her said will, signed her name thereto in the presence of two witnesses present at the same time, to wit, Thomas Dunn, the plaintiff, and R. Fowle, who both subscribed the said will in the presence of the said Mary Dunn, and that at the time of the said re-execution and re-publication, the said Mary Dunn was of sound and disposing mind, memory, and understanding. The plaintiff replied, denying that on the said 20th day of May, 1861, the testatrix had a mind and intention to re-execute and re-publish her said will, and that she did execute it as in the plea alleged. Joinder in issue.

Nov. 7. The cause was tried before Sir J. P. Wilde without a jury.

Robinson, Serjt., and *Dr. Tristram*, for the plaintiff.

Dr. Spinks, for the defendant.

The will of 1837 was proved in solemn form.

The plaintiff was examined, and stated that on the 20th of May,

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1861, he was on a visit to the testatrix, who expressed a desire to deliver to him her deeds and her will for safe custody, as he was to have her property on her death; that he expressed a wish to her that some independent person should be present to witness the transaction, so as to shew that he had not exercised undue influence over her, in which suggestion she acquiesced. That accordingly he went out, and brought R. Fowle, a friend and neighbour of hers, to the house; that the will and deeds, having been then brought down stairs by her, were handed to him in her house; and that his signature at the end of the will was signed by him as witnessing the delivery of the will to him, and not as an attesting witness; and that although the testatrix and R. Fowle then subscribed their names, it was not done for the purpose of re-executing the will. Richard Fowle stated that when he went into the house the testatrix said she wanted to give the will and writings up to Thomas Dunn, her nephew, for she was getting old, and she wished him to have her property on her death, and that she did not like to do so without having some one to see that she did so as a witness. She gave no reason for signing her name. He believed she signed her name first, and then he and Thomas Dunn. She said nothing to him about being a witness to the will.

SIR J. P. WILDE. This is a very remarkable case. The facts are in substance these: The testatrix having made what appears to be a good will as long ago as 1837, kept it by her, never having revoked it nor expressed in any way that she was dissatisfied with it until 1861, when she is supposed to have gone through the process of a second execution, and it is said that if that process was gone through, as one of the attesting witnesses to the execution was the sole legatee, she by that transaction revoked it. If that was the state of facts and the legal result it would certainly be a case of great hardship.

The question is one of fact, and the Court must inquire what was the transaction of the 20th of May, 1861. It appears on the face of the will that the signatures of the testatrix and of two other persons were affixed to it on that occasion, one of those signatures being that of the plaintiff, with the word "executor" before it—not witness, but executor. It is placed in about the only position on

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the paper where there is space for it, namely, beneath the original attestation clause. The name of the other person is opposite to it. What appears on the face of the paper, one man signing as an executor, not as a witness, does not look like a re-execution, but of course if the evidence shews that it was intended as a re-execution, there is nothing to prevent its having that effect. But both the witnesses who were present (one of them, the plaintiff, being interested, but the other having no interest) give this account of the transaction: That the testatrix was handing over the will to her nephew, and with the will her title deeds, and that the signatures were affixed to the will as evidence of its having been handed over by her. Their evidence as to the nature of the transaction is strongly corroborated by the fact, that she did bring down the will and the title deeds, and that he took them away with him. The last witness states distinctly that when she came into the room she did not say, "I want you to witness my will," but she said, "I want to give up my will and my title deeds to my nephew, and I do not wish to do so without a witness." I see no reason to doubt his evidence as to what took place, and I therefore hold that what took place on that occasion was not a re-execution, and that the will is entitled to probate by virtue of the original execution.

The only remaining question is as to the costs. I cannot say that it is a case in which the costs should come out of the estate, because if the application had been made to Fowle, he would have told the defendant the same story that he has told to-day. But on the other hand there is enough on the face of the paper to justify its being disputed. I therefore make no order as to costs.

Proctor for plaintiff: *G. R. Longden.*

Proctors for defendant: *Jennings & Son.*

ECKERSLEY *v.* PLATT AND OTHERS. 1866
Nov. 8.

Destroyed Will—Evidence as to Execution—Dependent relative Revocation—Presumption of Revocation—Evidence insufficient to rebut Presumption.

The only person present at the making of a will swore that it was not duly executed. The will was afterwards destroyed. Although there was reason to suspect that the will was duly executed notwithstanding the evidence, the Court declined to pronounce on that mere suspicion for a will not in existence.

The presumption that a will which was in the testator's custody until his death, and could not then be found, was destroyed by the testator with the intention of revoking it, must prevail unless it is rebutted by clear and satisfactory evidence. Where the only evidence to rebut that presumption and to establish a case of dependent relative revocation was given by a witness who was interested in setting up an earlier will, and whose conduct threw doubts upon his credibility, the Court refused to act upon his evidence, although it was uncontradicted, and held that the will was revoked.

THIS was a suit for revocation of probate. The testator, Robert Eckersley, late of Bolton, in Lancashire, muslin manufacturer, died on the 20th of January, 1864, leaving one child, Richard Eckersley, the plaintiff, surviving him. His property was of the value of about 3000*l.*, including a freehold house worth about 200*l.* After his death, a will dated the 29th of November, 1862, was proved in common form on the 11th of February, 1864, by Richard Eckersley, and Thomas Platt, the two executors therein named. By this will the testator left his freehold house and furniture to Platt, 300*l.* to the plaintiff, and the residue to Alice Eckersley, Robert Eckersley, and Mary Ann Eckersley, the minor children of the plaintiff. A few months after probate had been taken out, disputes arose between the plaintiff and Platt, which led to the institution of a suit in the Court of Chancery of the county palatine, and in the course of that suit the attesting witnesses to the will of November, 1862, were examined, and stated that they had also attested a will of the 18th of January, 1863. Inquiries were then made of Platt, who had drawn up all the wills, and he stated that the deceased had signed two wills subsequent to the will of November, 1862; one dated the 18th of January, 1863, which was precisely the same as that of November, 1862, except that it increased the plaintiff's legacy to 500*l.*; and the other dated the 18th of May, 1863,

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leaving all the property absolutely to the plaintiff, who was appointed sole executor. Both these wills contained general clauses of revocation. The plaintiff thereupon cited Platt to bring in the probate of the will of November, 1862, and filed a declaration alleging that it was revoked by the subsequent wills, that those wills were also revoked, and that the deceased died intestate. The minor children of the plaintiff were cited as interested in the residue under the will of November, 1862, and by their guardian appeared, and pleaded that the will was not revoked as alleged. Platt pleaded a similar plea, but did not appear by counsel. The cause was tried before Sir J. P. Wilde, without a jury.

The principal witness called on behalf of the plaintiff was Thomas Platt, a poor-rate collector at Bolton, who had drawn up the three wills for the deceased. He gave evidence of the due execution of the wills of November, 1862, and of January, 1863, and he was corroborated by the attesting witnesses of those wills. As to the execution of the will of May, 1863, he stated that he had called two men, Baxendale and Bradshaw, out of the street for the purpose of attesting it, that Baxendale and Bradshaw signed their names and left the room, and that the deceased did not sign his name until after they had left the room. Baxendale, a porter, and Bradshaw, a chair-maker, in substance corroborated the evidence of Platt. They said that they did not see the signature of the deceased on the paper when they signed, that there was no acknowledgment by him, that they did not see him writing anything on the paper, and that they believed he did not sign his name whilst they were in the room. As to the revocation, Platt stated that the deceased often had out the three wills, and he read them over to him when they were alone; that on one of these occasions, in November, 1863, the deceased pointed to one of the wills, which were all lying before him on a table, and said he wished that to be his last will, and then either he, at the request of the testator, or the testator himself, he could not recollect which, burnt the two later wills, and the testator put the remaining one away in his escritoire; that between that time and the death of the deceased he frequently saw him take out the will and read it over; that it remained in the deceased's possession until his death; that immediately after the death he searched the escritoire, and found the

will of November, 1862, in a secret drawer; that he was alone when he made the search and found the will; that he took it to his attorney, but said nothing to him about any subsequent wills; and that he afterwards took the plaintiff to his attorney to hear the will read, but never mentioned the subsequent wills to him, although he expressed surprise at the contents of the will of 1862; and that he never said anything about those wills until long afterwards, when inquiries were made about them in consequence of statements made by the attesting witnesses.

Evidence was given by the plaintiff and several other persons of repeated declarations made by the deceased, during the last few months of his life, that he had left everything to the plaintiff.

Dr. Spinks, for the plaintiff. Probate of the will of November, 1862, must clearly be revoked, as there is satisfactory evidence of the due execution of the will of January, 1863. The conduct of Platt has been so suspicious throughout these transactions that the Court cannot rely on his evidence, and, looking at the circumstances under which the will of May, 1863, was made, and that it appears to be duly executed on the face of it, and has a full attestation clause, the Court will be justified in finding that it was duly executed, on the presumption omnia rite esse acta, notwithstanding Platt's evidence. If Platt's account of its destruction is correct, it was destroyed with the intention of reviving the previous will, and, as it did not revive that will, the doctrine of dependent relative revocation applies, and the Court will grant probate of its contents as proved by Platt. He cited *Powell* v. *Powell*. (1)

Dr. Wambey, for the children, residuary legatees under the wills of November, 1862, and January, 1863. The Court cannot find that a will was duly executed, when both the attesting witnesses, and the only other person, besides the deceased, present at the time when they signed their names, positively swear that it was not duly executed. Even if the will were in existence, the Court could not pronounce for it on this evidence, but neither the will nor any draft or copy of it is produced, and according to *Wharram* v. *Wharram* (2), the Court cannot grant pro-

(1) Law Rep. 1 P. & M. 209.

(2) 3 Sw. & Tr. 301; 33 L. J. (P. M. & A.) 75.

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bate of its contents. The will of January, 1863, which will probably carry out the intentions of the testator, is therefore entitled to probate.

SIR J. P. WILDE. The evidence discloses a very peculiar, and, in some respects, a very suspicious state of circumstances. The most material evidence in the case is given by a person who is largely interested in supporting either of the two earlier wills, and who has so conducted himself that the Court cannot give implicit credence to his statements. The whole business is transacted by one man, the three wills are made by him, he is largely interested under the will which he brings forward on the death of the deceased, and he keeps to himself as long as he can the fact of subsequent wills having been made. There is no doubt that the wills of November, 1862, and of January, 1863, were duly executed. The first doubtful question is, whether the will of May, 1863, was also duly executed. The only persons present when it was signed swear that it was not; there is no other evidence with which their evidence can be contrasted, and, unfortunately, the document itself is not in existence. If, therefore, I were to find for the will of May, 1863, I should decide that the deceased made a will which is not in existence, and that he duly executed it, although all the persons present in the room at the time of the supposed execution swear that he did not. With every disposition to go as far as I reasonably can to set right any wrong that has been done, I cannot go that length. I may suspect that the will of May, 1863, was duly executed, but I cannot say that I have any proof of its due execution before me.

The next question is, what in point of law is the effect of the evidence as to the two earlier wills? Is it proved, to my satisfaction, that the deceased revoked the will of January, 1863? It was in the custody of the deceased up to the time of his death, and it was not found; therefore, in the absence of evidence respecting it, the ordinary rule of law would apply, and I should presume that it was revoked. If I come to any other conclusion, I must do so on the testimony of Platt. His account of what took place when the will was, as he says, burnt, must be the foundation of a decision that the will was burnt under such circumstances that the burning did

not amount to a revocation. But I feel great difficulty in relying on Platt's evidence, and, looking at all the circumstances of the case, I am not prepared to act upon it. I am not assured, on the evidence before me, that the testator destroyed the later will for the sole purpose of setting up the earlier one. In *Powell* v. *Powell* (1), I came to the conclusion, upon the evidence, "that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary papers." In the present case, that proposition has not been proved to my satisfaction.

The result is, that the will of November, 1862, was in terms revoked by the will of January, 1863, and that the presumption that the will of January, 1863, was destroyed by the deceased, with the intention of revoking it, is not rebutted by the evidence. I therefore revoke the probate of the will of November, 1862, and pronounce for an intestacy.

Dr. Wambey moved for the costs of the guardian of the minors out of the estate.

Dr. Spinks. I cannot oppose the motion.

The Court ordered the costs of the guardian to be paid out of the estate accordingly.

Solicitors for plaintiff: *Clarke, Woodcock, & Ryland.*
Solicitors for defendants: *Gregory, Rowcliffes, & Rawle.*

IN THE GOODS OF NEWBOLD.

Nov. 20.

Joint Grant of Administration—Widow and one of next of kin—Consent of Minors.

2 P. M. 216

The consent of next of kin, who are minors, and some of them of tender years, is not sufficient to justify the Court in making a joint grant of administration to the widow and one of the other next of kin, unless there are special circumstances for departing from the general practice of the Court.

THOMAS NEWBOLD died on the 23rd of October, 1866, intestate, leaving Mary Ann Newbold his widow, and five children by a former wife, all (with the exception of his eldest son James William

(1) Law Rep. 1 P. & M. 209.

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Newbold) in their minorities, and aged respectively twenty, nineteen, eleven, and nine, and two infant children by his widow, his sole next of kin, and the only persons entitled in distribution, him surviving. Mrs. Newbold was desirous that the eldest son should be joined with her in the grant of administration, and the other children by the former marriage, the youngest being nine years of age, had signed a consent to that effect.

Dr. Spinks moved for a joint grant to be made to the widow and eldest son.

[SIR J. P. WILDE. Can you shew any special grounds for such an application?]

The widow prefers that the son should be joined with her to taking the grant alone. Where the parties interested desire it, and both are entitled to the grant under the statute, it is usual to make a joint grant. The case *In the Goods of Browning* (1) is not in point.

SIR J. P. WILDE. I think the application is put on too high a ground, bearing in mind the circumstances of this case. It is assumed that with the consents filed it ought to be granted as a matter of course. But it is laid down in what has become the text-book of the Court—Coote's Probate Practice, 159-160—that the Court at all times prefers a sole to a joint administration, and that where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made. In this case some of the next of kin are of such an age as to be incapable of giving proper consents. I do not think the consent of the children who are minors, having regard to the ages of some of them, is sufficient to justify the Court in departing from the general practice, when there are no special grounds for so doing.

Application rejected.

Solicitor: *S. B. Somerville.*

(1) 2 Sw. & Tr. 634; 31 L. J. (P.M. & A.) 161.

In the Goods of STEPHENSON.

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Nov. 20.

Married Woman—Protection Order—Administration—Son sole next of kin a minor—Grant to a Guardian elected by him without citing Father—Justifying Sureties.

Where a married woman, living separate from her husband, having obtained a protection order, died, leaving him and a minor son her surviving, the Court made a grant of administration of her effects to a guardian elected by the son for his use and benefit without citing the father, requiring justifying securities.

The deceased Naomi Stephenson had obtained a protection order, while living separate from her husband, and died intestate, leaving him and their lawful son, a minor, her sole next of kin, her surviving. The son, under the 21st section of the Divorce Act (20 & 21 Vict. c. 85), was therefore entitled to the whole of her property, and had accordingly, passing over his father, elected his maternal grandmother his guardian for the purpose of taking a grant of administration to the deceased's estate.

Dr. Spinks moved for the grant to be made to the grandmother for the use and benefit of the minor, &c., without citing the father. This seems a reasonable mode of proceeding, and was so considered in *In the Goods of Mary Weir.* (1) It is a question for the discretion of the Court, whether the next of kin of a minor should be appointed his guardian: *In the Goods of John Ewing.* (2)

Sir J. P. Wilde. The case cited is a sufficient authority. The grant may go, on the guardian finding justifying securities to meet the contingency of the son dying during his minority, in which event the father would become entitled to the property.

Administration granted.

Proctors: *Nelson & Son.*

(1) 2 Sw. & Tr. 451. (2) 1 Hagg. Eccl. 381.

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Dec. 4.

COOMBS *v.* COOMBS.

Administration to Creditor—Statute of Limitations.

The creditor of an intestate is entitled to a grant of administration, although his right of action is barred by the Statute of Limitations.

When administration is granted to a creditor whose right of action is barred by the Statute of Limitations, the Court makes it a condition that he shall give a bond to distribute the assets pro ratâ amongst all the creditors.

James Coombs, late of Newington, in the county of Surrey, died in April, 1857, a widower, intestate and insolvent, leaving two sons surviving him. At the time of his death he was indebted to his brother, W. H. Coombs, in the sum of 400*l*. W. H. Coombs had cited the next of kin and persons entitled in distribution to accept or refuse letters of administration (1), and none of them had appeared.

Nov. 20. *Dr. Wambey* moved for a grant of administration of the estate and effects of the intestate to W. H. Coombs as a creditor. The only question is as to the effect of the Statute of Limitations, but as that statute merely bars the right of action and does not extinguish the debt, it does not affect the creditor's right to the grant. There is no authority against this motion.

[Sir J. P. Wilde. Is there any authority in its favour? I should feel less difficulty if all the next of kin and persons entitled in distribution had been personally served. By making the grant to the applicant I should enable him to pay himself, although his right of action is barred by the statute.]

In the case of an ordinary grant to a creditor he is able to pay himself. This Court ought not to take the statute into consideration.

Cur. adv. vult.

Sir J. P. Wilde. This was an application to the Court for a grant of administration to the effects of James Coombs, who died intestate and insolvent more than six years ago. The applicant claims to be a creditor, and has cited the next of kin and those

(1) *In the Goods of Coombs*, Law Rep. 1 P. & M. 193.

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entitled in distribution, none of whom have appeared, to take the grant. The citation on one of these parties who was abroad was served by advertisement. Under these circumstances a grant to the applicant would be in accordance with the daily practice o this Court, save for the fact that the intestate died more than six years ago, and the debt is therefore barred by the Statute of Limitations. All doubt that the debt is thus barred is removed by the case of *Rhodes* v. *Smethurst* (1), decided in the Exchequer Chamber. The question then arises whether a man who claims to be in possession of a right of this description is a creditor in such a sense that this Court is justified in handing over to him the intestate's effects, and thus putting it in his power to pay himself the money which he says was due to him without more ado. It is argued that the debt is not extinguished by the statute but only the remedy barred, and such no doubt is the language commonly held in courts of law on the subject. But this expression must not be supposed to carry too much with it. The statute furnishes an absolute legal answer to the hand of the supposed debtor, and in the sense of a legal obligation enforcible by law, it does therefore extinguish the debt at his volition. But it is only at his volition, the courts of law having always held that it was optional with the defendant to plead the statute or not, and that if he did not, the law would treat the debt as an existing obligation and lend the process of the court to enforce its discharge. Such being the rights of the creditor and debtor while the latter was alive, the next question is, whether an executor or administrator has the same option as the supposed debtor would have had if alive? It will be found stated in Mr. Justice Williams's book, vol. ii. p. 980 (6th ed.), that an executor or administrator may "retain a debt due to himself though it may be more than six years old;" and several cases are cited for the proposition, the most recent of which is *Stahlschmidt* v. *Lett.* (2) The mode in which the courts of equity appear to have arrived at this conclusion is this: It has long been established that an executor is not bound to plead the statute against the demand of a third person claiming to be a creditor of the estate, and thence it seems to have been deduced that if he had this option in the case of another he ought to have it in his own.

(1) 6 M. & W. 351.

(2) 1 Sm. & Giff. 415.

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This Court is, I think, bound to shape its course in obedience to this decision. The applicant here has a right to say that he is in possession of a claim which the courts of equity will sanction his discharging out of the assets of the deceased, and in virtue of that right to ask at the hands of this Court the possession of those assets if neither the relatives of the deceased nor any other creditor makes his appearance to demand it. It has been assumed all along that the debt is a just debt, for the applicant swears that it is, and the daily practice of the Court is to act upon the creditor's oath on that head, and rely on the bond which he gives to administer according to law. But having regard to the peculiar circumstances of this case, I think the Court will do right in requiring that the bond contain an obligation to distribute the assets rateably with other creditors, and without any preference of his own debt. It was the common practice of the Ecclesiastical Court to impose this restriction in the case of a contest between two creditors for the grant (see Toller's Executors, p. 105), and in the case of *Elisha Peck* (1), Sir C. Cresswell, I believe, did the like where the next of kin were minors, and the creditor took the grant as their guardian.

Administration granted.

Proctor: *Goldsmith.*

(1) 1 Sw. & Tr. 141.

IN THE GOODS OF MARY CARR. 1867

Administration de bonis non—Representative of next of kin—Party entitled in Distribution—General Rule—Exception. *March* 12.

On sufficient grounds shewn, the Court will depart from the general practice of the registry by which a party originally entitled in distribution is preferred in making a grant de bonis non to a party having a derivative interest, *e.g.* the personal representative of the next of kin, and will make the grant to the latter.

MARY CARR died on the 23rd of March, 1866, a spinster, leaving Robert Carr, her lawful brother, and Matilda Goodricke, her lawful niece, the only persons entitled in distribution to her personal effects.

On the 29th of June, 1866, letters of administration of the effects of the deceased were granted to Robert Carr, who died on the 19th of January, 1867, leaving part of her estate unadministered, and by his will he appointed his wife, Grace Carr, and Alexander Smith, executors. Grace Carr alone proved this will. Robert Carr, as such administrator, had, at his own cost, commenced an action on the 21st of July, 1866, against George Goodricke, to recover a sum due from Goodricke to the deceased, and certain property in his possession, forming part of the estate of the deceased; and an appearance to the action was entered by the attorney of George Goodricke, and issue was joined in the action, and ultimately all matters in difference were by consent of both parties, and by a judge's order, referred to arbitration.

The sittings in the arbitration had been closed, but the arbitrator had not yet published his award.

There were no assets, except what might be recovered in this action.

It appeared by the affidavit of Grace Carr that Matilda Goodricke was residing with the defendant to the action, and was adverse to its prosecution; and that if the grant de bonis non were made to the latter, there was an apprehension that she might attempt to compromise the action, or not duly enforce the award against George Goodricke.

Dr. Twiss, Q.C., moved for a grant de bonis non of the effects

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of the deceased to be made to Grace Carr as the personal representative of the person who was sole next of kin of the deceased at the time of her death. The party entitled in distribution has not, according to the practice, been cited, but having appeared that difficulty is removed. The case not being within the statute, it is in the discretion of the Court to make the grant to either party. The grant ought to be made to the executrix of the administrator, on two grounds. 1. Because the interest rather preponderates in her favour, as the administrator's estate has a claim for the costs incurred in the action, in addition to a moiety of the property: *In the Goods of Anne Middleton.* (1) 2. The relations of Matilda Goodricke towards the defendant are such as to render it not improbable that she might be disposed to favour him in the pending action to the prejudice of the estate: *Budd* v. *Silver* (2); 1 Williams on Executors, 5th ed. p. 456.

Dr. Swabey, contrà. Matilda Goodricke is entitled to the grant according to the general practice of the registry: 1 Williams on Executors, p. 457, and the reasons assigned are not sufficient to induce the Court to depart from the practice.

SIR J. P. WILDE. It is clear from the argument on this case how the matter stands. There are three propositions established. The first is, that the Court is not bound by the statute to make the grant to the party entitled in distribution. The second is, that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to a party having a derivative interest. The third proposition is, that the whole matter is in the discretion of the Court.

Are the circumstances of this case such as to justify the Court in departing from the general practice by not making the grant to the person generally entitled to it?

The case is a peculiar one. There are no assets excepting what may be recovered in a suit now pending, and that suit was instituted and carried on by the next of kin of the deceased, who was her administrator, and the person now applying for the grant is the executrix of the administrator, and has an interest in the suit with

(1) 2 Hagg. Ecc. 60. (2) 2 Phill. 115.

reference to the costs incurred in it. The Court also cannot shut its eyes to the fact that the party entitled in distribution is residing in the service of the defendant to that action; and it is very undesirable that a suspicion should exist that the real merits of the case as against the defendant would not be contested by reason of there being anything like an understanding between these two parties. The grant must therefore go as prayed to the executrix of the next of kin. I will make no order as to costs.

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Proctor for Mrs. Carr: *Ring.*
Solicitor for Miss Goodricke: *Skilbeck.*

L., FALSELY CALLED H. *v.* H.

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Nov. 27.

Practice—Appeal—Record of Decree of House of Lords entered on the files of the Court—Costs.

A decree made by the House of Lords, on appeal, will be recorded on the files of the Court upon a copy of such decree, verified by affidavit, being deposited in the registry.

A wife's petition for nullity was dismissed by the Court, and no order was made as to costs. On appeal, the House of Lords pronounced a decree of nullity, but made no order as to costs:—

Held, that the Court had no power to make an order as to costs.

THE petitioner prayed for a decree of nullity of marriage on the ground of the impotence of the husband. He filed an answer denying the charge. The cause was heard by the Judge Ordinary in camerâ, and the prayer of the petitioner was rejected (1), and the respondent dismissed from the suit, and no order made as to costs. (2) On appeal, the House of Lords reversed the decree of the Judge Ordinary, and declared the marriage between the petitioner and the respondent to be null and void, and further ordered "that the cause be remitted back to the Court for Divorce and Matrimonial Causes, to do further therein as shall be just and consistent with this declaration and judgment."

(1) 4 Sw. & Tr. 115; S. C. 34 L. J. (P. M. & A.) 81.

(2) No order had been obtained previous to the hearing of the cause for the taxation of the petitioner's costs of the hearing and the deposit of the amount of those costs in the registry.

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L., falsely called H. v. H.

The Queen's Advocate (*Dr. Spinks* and *Searle* with him), for the petitioner, moved that the decree of the House of Lords might be recorded or registered in this court, and further that the respondent should be ordered to pay the costs of the suit in this court.

[The Judge Ordinary. What was done in the House of Lords as to costs?]

The petition of appeal prayed that the respondent should pay the whole costs of the proceedings, but their Lordships refused to hear counsel on the question and made no order as to costs. The petitioner having succeeded, she ought to be placed in the same position in regard to costs as if she had obtained a decree in this court, and in that event she would have had her costs, as a matter of course.

Dr. Swabey, for the respondent. The House of Lords had full power to deal as it pleased with costs, both of the appeal and in this court (20 & 21 Vict. c. 85, s. 51), and it made no order. This Court has no jurisdiction to make any order as to costs at this stage of the suit.

The Judge Ordinary. The House of Lords has reversed the decree, and has also declared the marriage null and void. This Court has now no power to do anything beyond ordering the decree of the House of Lords to be recorded, in order that a record of each stage of the suit and of its termination may appear on its files. On a copy of the decree of their Lordships, verified by affidavit, being brought into the registry, it will be recorded accordingly. With regard to the costs, the House of Lords having exercised its discretion by making no order as to costs, I cannot interfere with that exercise of discretion. I therefore make no order as to costs.

Solicitors for petitioner: *Benham & Tindell.*
Solicitors for respondent: *Thrupp & Dixon.*

MILFORD *v.* MILFORD.[1]

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Dec. 18.

Dissolution of Marriage—Cruelty.

In order to establish the charge of cruelty, it is necessary to prove actual violence of such a character as to endanger personal health or safety, or the reasonable apprehension of such violence. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.

Se Pow 715

12 LD 61

THIS was a petition by a wife for a dissolution of marriage, on the ground of adultery, coupled with cruelty. The respondent, in his answer, admitted some of the charges of adultery, and denied the charge of cruelty. The cause was tried by the Judge Ordinary, without a jury.

The marriage took place in October, 1855, the petitioner then being twenty, and the respondent twenty-three, years of age. He was the son of a banker at Exeter, and two years after the marriage he went into business as a partner with his father. He and the petitioner lived together at Ide, near Exeter, and they had two children, aged ten and eight. Evidence was given of repeated acts of adultery committed by him with prostitutes in Exeter, and with other women, at the time when he was cohabiting with his wife, and since the separation.

The evidence of Mrs. Milford as to the charge of cruelty was in substance as follows:—In 1858 we were staying at Budleigh Salterton, and my husband became very intimate with a lady, against my wish, and we had frequent discussions about her. He brought her picture to our house at Ide, and hung it up in his room. It caused me a great deal of pain. He was very neglectful and inattentive to me. He was irregular in his habits, and used to come home very late. I did not know where he went, but he generally said he had been at his club playing billiards. He frequently swore at me, and I think he has done so in the presence of servants. In August, 1859, or 1860, I found out something about a girl living in the village of Ide, and spoke to him about it. He promised amendment, if I would drop the subject. I renewed the subject on one occasion, because I wished to find out whether he had spoken the truth about it. He took up the

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poker, and said: "If you go on talking about it, I will dash your brains out." He flourished the poker over my head. No one else was in the room. I was sitting in an easy-chair by the fire. I sat still, and said: "It is no use your doing that; you had better put the poker down." He threw it down, and soon after he left the room. I wrote a letter to my brother-in-law, and my husband destroyed it. The next morning I wrote another, and I told him I would not send it if he would say he was sorry for what he had done. He said something, and I destroyed the letter. Once I was going to the door with him as he was starting for Exeter. He turned back with an angry reply, and thrust out his fist towards me. I stepped back, and his hand just touched my dress. One evening I tried to persuade him to go to an evening party, and he refused. He said he would go to Exeter. I said: "Then I will go with you." I went upstairs to the bedroom and put on one of my boots. He followed me into the room, and threw my other boot out of the window into the garden. I went into the garden and picked it up. He then threw a clothes-brush at me out of the window. It was a latticed window, with a looking-glass in front of it, and he threw the brush over the looking-glass. It fell behind me. I went with him part of the way to Exeter, and then he persuaded me to turn back. The servants removed the lady's picture from the dressing-room in 1863, and destroyed it. He several times asked me what had become of it. One evening in 1863 he said when he came home: "Now, I will have you tell me where that picture is." He said it in a joking way, and I treated it as a joke. I said: "You will never get it out of me." When he came upstairs to bed he was evidently very angry. He used very unkind language, and said: "I would, or I could, keep a woman to spite you." We were then in bed. I said: "If you do, I shall not bear it." He said: "You make me so angry, I will smother you," and he took up the pillow and put it over my face. I threw it off, and got up and said I would go and tell Miss Milford. I went to the bedroom door. He jumped out of bed and swung me away, and bolted the door. I went to the window and stood there till he was in bed. I then began to get out of the window. He came to me and said: "I did not mean to drive you as far as this." He went on saying galling things. I

was in hysterics. He got frightened and put me back to bed, and fetched me a glass of wine. In March, 1865, I discovered his intimacy with a lady in Exeter; and in April, 1865, I left him and went to my parents.

Cross-examined: I believe he never saw the lady with whom he had been intimate at Budleigh Salterton after 1859. She lived in Birmingham. But I mentioned the picture several times to him. I could not help shewing I was wounded by his want of affection. He always assured me that nothing had taken place between them. I had renewed the conversation about this lady before he took up the poker. I may have pointed out to him that he had contradicted himself. I had promised not to renew the subject. I began it again to see if he had spoken the truth. After he had thrown the brush out of the window I put on my other boot, and we walked together for about a mile towards Exeter. I did not tell Miss Milford that he had put the pillow on my face. I can't swear that I did not tell Miss Milford that he pushed the end of my pillow over my face, saying: "For God's sake hold your noise." I don't remember it. When I left in 1865 he met me at the station, and saw me start by the train. We parted affectionately. I have the children with me, and he has never seen them since I left.

Some servants were examined in corroboration of the petitioner's evidence.

No evidence was called for the respondent.

J. B. Karslake, Q.C., and *Dr. Spinks*, for the petitioner. The evidence of the petitioner establishes the charge of legal cruelty. The petitioner's conduct was invariably most forbearing, but there appears to have been constant disputes arising from the respondent's dissipated habits and intrigues with other women. Even without actual violence, or threats of violence, there may be such conduct on the part of a husband as to found a decree on the ground of cruelty. They cited *Otway* v. *Otway* (1); *Holden* v. *Holden* (2); *Hulme* v. *Hulme*. (3)

Coleridge, Q.C., and *Searle*, for the respondent. Admitting the accuracy of the petitioner's evidence, it is far from establishing

(1) 2 Phill. 95. (2) 1 Hagg. Const. 453. (3) 2 Add. 27.

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a case of cruelty. On none of the four occasions on which she relies was she in danger of bodily injury, and her own conduct shews that she did not apprehend it. She continued to cohabit with the respondent long after the last occasion, and she left him, not in consequence of any violence, but in consequence of discovering one of his acts of adultery. Most of the quarrels appear to have arisen from her jealousy, unfounded in some instances, and from her persisting in discussing matters likely to annoy and provoke him. In no case has a decree been granted for cruelty upon such evidence. In the cases cited adultery had been proved, which was sufficient of itself to found the decree of the Ecclesiastical Court; and it was therefore immaterial whether cruelty was held to be established or not. They cited *Scott* v. *Scott* (1); *Hudson* v. *Hudson.* (2)

THE JUDGE ORDINARY. There is no doubt that the respondent has been guilty of adultery of a very profligate character. The question of cruelty requires a very critical examination. It is just one of those cases in which the Court is bound to take care that it is not induced, by the desire of giving full relief to the wife, to trespass beyond the limits assigned by the law to the definition of legal cruelty.

Cur. adv. vult.

THE JUDGE ORDINARY. After a mature consideration of the evidence, I am unable to pronounce the case of the petitioner proved in respect of the cruelty alleged, though of adultery there is no doubt.

There is no room for surprise that the petitioner should desire a dissolution of her marriage with a man whose dissolute and profligate habits were both proved and admitted. But the legislature has accorded divorce to a wife in those cases only in which adultery, however habitual and open, has been coupled with legal cruelty. Whether the conduct complained of amounts to legal cruelty is the question.

During the whole cohabitation, a period of nearly ten years, there were only four occasions on which anything like actual violence or

(1) 33 L. J. (P. M. & A.) 1,

(2) 3 Sw. & Tr. 314; 33 L. J. (P. M. & A.) 5,

injury to the person of the petitioner was suggested. I do not propose to recapitulate the details of these occasions. The evidence satisfies me that on no one of them was any appreciable bodily harm in fact inflicted upon the petitioner, still less any injuries calculated to interfere with her health or permanent safety.

Two of the incidents relied upon were most trifling in their character. A third consisted of a charge that the respondent put a pillow over her head, which, according to her own account, she threw off at once, a result hardly consistent with the idea that he really intended to smother her. Her cross-examination in this matter made it, moreover, very doubtful whether it had not been much exaggerated.

The fourth charge consisted of a threat of serious violence, but not, in my judgment, seriously intended.

It was argued that the conduct of the respondent on most, if not all, of the four occasions was to be in some measure accounted for by the injudicious conduct of the petitioner—at one time insisting on walking to Exeter with him against his will; at others teasing him about the picture of a person whom he had not seen for two years, or raking up matters of complaint long past and by common consent agreed to be no further discussed between them. But as nothing that the petitioner did would, in my opinion, have justified actual violence of a character such as would constitute legal cruelty, further investigation of her conduct is unnecessary. And the question comes back, whether legal cruelty has in fact been committed?

The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. Nor do the cases cited in the argument, whatever general expressions may have fallen from the Court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread. And as there is nothing in the evidence in this case to induce the conclusion that the petitioner's safety was compromised, or any fears for it entertained

12 L.T. 615

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even by herself, the only relief the Court can afford is a judicial separation on the ground of adultery.

It was also ordered that the petitioner should have the custody of the children of the marriage until further order, and that the respondent should have reasonable access to them.

Attorney for petitioner: *C. Shepheard.*

Attorneys for respondent: *Harrison, Beal, & Harrison.*

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Feb. 20.

HEAL *v.* HEAL.

Costs of Wife—Judicial Separation—Charge of Cruelty not proved.

A wife having failed to establish a charge of cruelty, her petition for judicial separation was dismissed. As she had a larger separate income than the income of the husband, and as the Court was of opinion that the suit had been improperly instituted, an order for the payment of her costs of the hearing, under the 159th rule, was refused, although they had been taxed, and security for the amount had been deposited in the registry.

THIS was a petition by a wife for judicial separation on the ground of cruelty. The respondent pleaded a denial of the charge, and provocation. The cause came on for trial before the Judge Ordinary by a common jury.

It was proved in the course of the trial that the petitioner was possessed of a sum of 1000*l.*, and of an income of 100*l.* a year, settled upon her to her separate use, and that the respondent had a much smaller income, derived from a ship of which he was the owner.

The jury found a verdict for the respondent, and the Court dismissed the petition.

Dr. Deane, Q.C. (*Murphy* and *Bayford* with him), for the respondent, moved for an order, under rule 159, that the petitioner might be allowed her costs of the hearing up to the sum of 90*l.*, for which security had been given in the registry.

Dr. Spinks, Q.C., for the respondent. The wife being unsuccessful, and having more property than the husband, she is not entitled to her costs.

Dr. Deane. That objection ought to have been taken when the

application was made for an order to tax the wife's costs of the hearing, and to deposit them in the registry. The costs having been taxed and the security given, she has a right to the order for their payment.

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THE JUDGE ORDINARY. I shall make no order as to the wife's costs. It appears that she has more property than the husband, and it seems to me that she has been induced to institute this suit by other persons. Having failed to make out her case, she must pay her own costs.

Attorneys for petitioner: *Deacon & Co.*
Attorneys for respondent: *Ashurst & Co.*

IN THE GOODS OF PARKER.

1866 *Nov.* 13.

Practice—Administration Bond—Signature not duly attested—Rule 38.

An administration bond was attested by two witnesses, but not by the person who administered the oath to the administratrix as required by rule 38. The estate being small, and the administratrix resident in New South Wales, the Court dispensed with the rule, and made the grant.

SAMUEL PARKER died at Morpeth, in New South Wales, on the 11th of December, 1858, intestate, leaving a widow, on whose behalf an application was made to the principal registry for a grant of administration of the effects of the deceased in this country. The widow lived in New South Wales, and the papers necessary to enable her to obtain the grant were sent out to her. On their being returned, it was found that the execution of the bond by the widow and the two sureties was attested by two witnesses, but was not attested by the person who administered the oath to the administratrix, as required by rule 38. The registrar was, therefore, unable to make the grant. The amount of the property was 116*l.*

Dr. Spinks moved the Court to dispense with the rule, and allow the grant to pass, notwithstanding the informality. The statute does not require the bond to be attested in this manner, and there is no doubt as to the identity of the administratrix.

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IN THE GOODS OF PARKER.

SIR J. P. WILDE. It is very desirable that the rule should be adhered to, for the object of it is to establish the identity of the person who executes the bond with the person who has sworn the oath. But looking at the particular circumstances of this case, and considering that the estate is small, and the administratrix is abroad, I think the Court may dispense with the rule.

Motion granted.

Attorneys: *Parker, Rook, & Parkers.*

Dec. 11.

IN THE GOODS OF COOMBS.

Execution of Will—Place of Testator's Signature—15 *Vict. c.* 24.

A will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and of the attesting witnesses, which were written crossways on the second page:—

Held, that the will was duly executed.

JOHN JERRED COOMBS, of Salisbury, cabinet-maker, died on the 25th of September, 1866, leaving a will dated the 16th of January, 1866.

The will was written on the first and third pages of a sheet of foolscap paper, the second side having been left blank. The will filled the whole of the two pages on which it was written, the last words being at the bottom of the page, so as to leave no room for the signatures of the testator and of the witnesses beneath them. The attestation clause and the signatures were written crossways along the middle of the second page, and near the fold of the paper, as follows:—

"Witness this my hand, January sixteenth, one thousand eight hundred and sixty-six.

John J. Coombs.

Witnesses, James Haskell.

James Halbert Haskell, jun."

The attesting witnesses made affidavits that the whole of the will as it now appeared was written before the execution.

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IN THE GOODS OF COOMBS.

Pritchard moved for probate of this will as duly executed. There is no question as to the testator's intention to give effect by his signature to the writing as his will, and the case is within Lord St. Leonards' Act (15 Vict. c. 24). He cited *In the Goods of Jones* (1), and *In the Goods of Wright.* (2)

SIR J. P. WILDE. I think the case comes within the rule laid down in the two cases cited. There being no room for the signature in the usual place, it was written across the second page, which had been left in blank. I think the signature is "so placed, at or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." (3) I therefore decree probate.

Proctor: *Langdale.*

IN THE GOODS OF WHITHAM.

Dec. 18.

20 & 21 *Vict.* c. 77, s. 79—*Renunciation by Executor—Retractation and Second Renunciation.*

The 79th section of the Probate Act does not apply to an executor who had renounced before that act came into operation; and the retractation of such renunciation after the act came into operation, and a second renunciation after such retractation, will not bring him within that section.

GEORGE WHITHAM died on the 31st of May, 1835, leaving a will and codicil, whereof he appointed Allott, Beake, and Ramsey executors and residuary legatees in trust. The trusts were to invest the residue, and to divide the annual produce between the testator's brother Joseph Whitham, and Hardwick, during their joint lives, then to the survivor for life, and then to the children of J. Whitham. The three executors renounced, and administration with the will and codicil annexed was granted by the Prerogative Court of York to J. Whitham and Hardwick, on the 5th of February, 1836. Hardwick died in 1836. J. Whitham died on

(1) 4 Sw. & Tr. 1; 34 L. J. (P. M. & A.) 41.

(2) 4 Sw. & Tr. 35; 34 L. J. (P. M. & A.) 104.

(3) 15 Vict. c. 24.

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the 25th of October, 1842, without child, leaving a will whereof he appointed Allott and Ibbetson executors and residuary legatees in trust, and Allott residuary legatee. Ibbetson renounced, and on the 12th of December, 1842, probate of the will of J. Whitham was granted by the Prerogative Court of York to Allott. On the 4th of January, 1843, administration de bonis non with the will and codicil of George Whitham annexed, was granted to Allott by the Prerogative Court of York. On the 16th of September, 1865, Allott died, leaving a will, whereof he appointed his widow, Christiana Allott, executrix. Since the Probate Act of 1857 came into operation, Ibbetson had retracted his renunciation as executor of Joseph Whitham's will, and, on the day following that retractation, he renounced again.

Dr. Spinks moved for a grant of administration de bonis non of the estate and effects of George Whitham, with the will and codicil annexed, to Christiana Allott. The question is, whether the second renunciation of Ibbetson is within the 79th section of 20 & 21 Vict. c. 77 (1), because, if that section applies, the applicant is clearly entitled to the grant. His retractation places him in the same position as if he had never renounced.

[SIR J. P. WILDE. You say that a man who has renounced before the act came into operation may, after the act, retract that renunciation for the express purpose of renouncing again, and bringing himself within the act. If you are right, this awkward result would follow: that a person so acting, might, by operation of law, cast upon some third person in the chain of representation duties and obligations which he never contemplated. It is obvious that what has been done is a sort of juggle, by which a person who renounced before the act has attempted to turn himself into a person renouncing after the act.]

The words of the section are clear, and do not prohibit his taking

(1) "Where any person after the commencement of this act renounces probate of the will of which he is appointed executor, or one of the executors, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

this course. Circumstances may have occurred which induced him to change his mind, and the retractation and subsequent renunciation may be perfectly bonâ fide. He cited *Venables* v. *East India Company* (1); *Harrison* v. *Harrison*. (2)

SIR J. P. WILDE. The question turns entirely on the statute. If the words of the 79th section apply to the circumstances of the case, then all that is contended for appears to follow. If Ibbetson is really within the meaning of the act a person who has renounced after the commencement of the act, then it follows that his rights in respect of the executorship are at an end, and the representation will devolve in the same way as if he had never been appointed an executor. The legislature seem to have intended in the 79th section to draw a line between persons who renounced before the commencement of the act and those who renounced after it came into operation. The act makes no provision for the case of persons renouncing before its commencement. The rights conferred, and the duties created, by the 79th section, are expressly limited to the case of persons who renounced after its commencement. Ibbetson did in fact renounce before the commencement of the act. After the act came into operation and upon the death of the acting executor, he signed a paper on one day retracting his renunciation, and on the day following he signed a fresh renunciation; and it is argued that by so doing he is within the meaning and intention of the 79th section a person who renounced after the commencement of the act. I think that is not so. The form he has gone through has not altered the nature of the transaction, so as to make him a person to whom this statute was intended to apply. I think it is not competent for a person to retract his renunciation for the purpose of renouncing again. It is true that the ecclesiastical courts did permit a man who had renounced to retract his renunciation, but it was for the purpose of taking a grant, and was in fact a part of the application for a grant. Except for that purpose, I think that it is not competent for an executor to retract his renunciation. It is obvious that in this case the retractation was for the purpose of renouncing again. The words of the 79th section must be considered to apply to a person who has

(1) 2 Ex. 633. (2) 4 N. of C. 434.

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In the Goods of Whitham.

renounced for the first time after the act. I have already pointed out that a different construction would give a retrospective effect to the words of the act, and, by making it apply to persons who had renounced before as well as after the act, duties might be cast upon persons holding a position in the chain of representation, which they never contemplated, at the sole volition of a third person, who did not intervene at the time when he ought to have intervened. I am therefore of opinion that this application must be refused.

Proctors : *Fielder & Sumner.*

Nov. 6.

In the Goods of LLANWARNE.

Administration—Grant under s. 73 *of* 20 & 21 *Vict. c.* 77.

The mother of an intestate being willing to renounce her right to a grant of administration, and her husband being in Australia, the Court, without requiring the renunciation of her husband, passed her over and made the grant to the intestate's sister under s. 73 of the 20 & 21 Vict. c. 77.

C. A. Llanwarne died on the 18th of January, 1866, intestate, a spinster, leaving her mother and one sister her surviving. The mother had married a second time, and her husband had for many years been in Australia. She wished to renounce her right to the grant, in order that it might be taken by the deceased's sister.

Dr. Spinks moved that the grant might be made to the sister without requiring the renunciation of the mother's husband. There is no property in which the intestate was beneficially interested, but it is necessary to obtain a grant in respect of some money standing in her name, but belonging to another person.

Sir J. P. Wilde. It would be unreasonable to put the parties to the expense of obtaining the husband's renunciation. As the mother is willing to be passed over, I make the grant, under the 73rd section, to the sister.

Proctor : *John Wills.*

IN THE GOODS OF HINDMARCH. 1866 Dec. 11.

Interlineations in Will—Evidence that they were made before Execution—Expert's Evidence.

Some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will. On that evidence the Court admitted them to probate.

W. M. HINDMARCH, of the Temple and of Notting Hill, barrister-at-law, died on the 29th of August, 1866, leaving a duly executed will, dated the 21st of February, 1855, whereof he appointed four executors. The will was holograph, and it contained several alterations and interlineations. The initials of the testator were written in the margin opposite to each of these interlineations and alterations, but the attesting witnesses, Henry Manisty and Charles Buller, were unable to say whether or not they were in the will at the time of its execution. The alterations were unimportant, the most material of them being the interlineation of the words "further or other," in a clause directing the trustees to allow a portion of the income of the trust property during his wife's widowhood to his son. The clause with the interlineation ran as follows: "nor shall he, during my wife's widowhood, have any claim to any *further or other* part of the income arising from the said trust property, or upon my said wife or trustees in respect thereof." Mr. Charles Chabot, expert in writing, made an affidavit stating that in his opinion all the alterations and interlineations were made at the time when the will was written. Referring to the interlineation of the words "further or other," he said, "the same appears to have been, and no doubt was, made by the testator after he had written the words 'part of,' which immediately follow the said interlineation, and before he wrote the words 'the income arising,' and subsequent words following the last mentioned. I believe that when the testator had written the words 'part of,' the sediment of the ink in his pen suddenly descended to the point thereof, and caused him to stop for the purpose of cleaning or trimming the point of such pen, and before continuing the writing he made the said interlineation,

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and then continued the line of writing, as is apparent from the fact that the colour of the ink and the size of the writing of the words 'further or other,' and the words 'the income arising, &c.' correspond, and are written smaller and more finely than the words 'part of.'"

Dr. Spinks moved for probate of the will, with the alterations and interlineations, to the executors. Although they were not called to the attention of the attesting witnesses at the time of the execution, the Court is at liberty to receive any evidence that they were made before the execution, and the evidence of the expert, although slight, is sufficient to justify the Court in admitting them to probate.

SIR J. P. WILDE. The interlineations are very trifling, and apparently of little consequence. The principle, as Dr. Spinks has correctly stated, is, that the Court may come to the conclusion that they were in the will at the time of the execution upon any reasonable evidence, without insisting upon the oath of the attesting witnesses, or any other particular species of evidence. The evidence of the expert, although if I were asked to criticise the grounds on which he has formed his opinion I should say it is not very strong, is entitled to some consideration, as that of a man accustomed to deal with questions of this kind. Taking this into consideration, together with the facts that the testator was a lawyer, that the alterations are all of a trifling character, and that they bear the appearance of having been written with the same pen and ink as the rest of the will, I think that they may be admitted to probate.

Attorneys: *C. & H. Bell.*

WOOD *v.* WOOD. 1867 *Jan.* 11.

Existing Will revoked by later Will not existing—Parol Evidence of Contents of later Will.

A will was found after a testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, and which remained in his custody until his death, and could not then be found, and that he had declared an intention to destroy it. The Court pronounced for an intestacy.

GEORGE WOOD, of Clifton, in the county of York, wire drawer, died on the 13th of March, 1866, leaving one child, Hannah Maria Wood, the plaintiff. After his death, a duly executed will, bearing date the 2nd of September, 1864, was found, of which Matthew Wood was executor. A subsequent will, of the 25th September, 1865, had, however, been executed, of which Matthew Wood and Rowland Walker were executors, but that will could not be found. A caveat having been entered on behalf of M. Wood and R. Walker, it was warned by the guardian of Hannah Maria Wood, the plaintiff. M. Wood and R. Walker then declared, propounding the will of the 25th of September, 1865, and alleging that, although lost or mislaid, it is still valid in law and unrevoked, and that its contents are as follows: The testator thereby revoked all former wills and codicils, and bequeathed a legacy of 50*l.* to each of his putative children, Annis Fearnside and Dennis Fearnside, and bequeathed his household effects to his daughter, and devised and bequeathed all his real and the residue of his personal estate to M. Wood and R. Walker in trust to pay the rents and proceeds thereof to his daughter for her life, and at her death both the capital and interest for all her children, but if no children who should live till twenty-one, then for his putative children, Annis and Dennis Fearnside; and he appointed M. Wood and R. Walker executors. The plaintiff pleaded that the will had been destroyed by the deceased with the intention of revoking the same, and that the deceased died intestate. The cause was heard before the Court without a jury.

The Queen's Advocate, for the plaintiff.

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Dr. Spinks, Q.C., and *Searle*, for the defendant.

Mr. Jessop, the managing clerk to the deceased's attorney, proved that the will had been prepared by him from the deceased's instructions, and that its contents were as set out by the defendants in the declaration. He and a fellow clerk, Mr. Barber, were the attesting witnesses, and they proved its due execution.

There was no draft or copy of the will as it had been written out from the deceased's dictation, but there was an entry in the day-book of a will having been made for the deceased on the 25th of September, 1865, for which he was charged 7*s.* 6*d.*

Annis Fearnside, one of the deceased's putative children, who had lived with him for some time before his death, said that he once shewed her two wills, in which her name and that of her brother appeared, and that he afterwards told her that he should destroy both the wills, and have another seven and sixpenny will made, because he did not want to have Rowland Walker's name in it.

SIR J. P. WILDE. The facts of this case up to a certain point are the same as those of *Brown* v. *Brown* (1), in which it was held that a second will having existed the first was revoked. This case, however, is stronger, for there is positive evidence in corroboration of the witness who drew the second will, and who proves its contents. There is the entry in the cash-book, made at the time when the will was prepared, and the person most interested in upholding the will gives evidence of a conversation with the testator in which he spoke of destroying it. The conclusions to which I come are, that there was a second will of the 25th of September, 1865, which revoked all former wills, and that will remaining in the deceased's possession, and not being found at his death, was revoked by him. I therefore pronounce for an intestacy. The costs of all parties will be paid out of the estate.

Proctor for plaintiff: *A. Ayrton.*

Proctor for defendant: *G. T. Ring.*

(1) 8 E. & B. 886.

PEACOCK AND ANOTHER *v.* LOWE. 1867 *Feb.* 5.

Practice—Citation of Heir at Law—Proceedings to prove Will in solemn form— 20 *&* 21 *Vict. c.* 77, *s.* 61.

Where, in a suit commenced by caveat, the party propounding a will wishes to cite the heir at law under the 61st section of the 20 & 21 Vict. c. 77, before pleas have been filed contesting the validity of the will, he must make an affidavit that he intends to proceed and prove the will in solemn form.

MAURICE P. MOORE, deceased, left a will, whereof he appointed the plaintiffs executors. A caveat having been entered by the defendant, the only daughter and next of kin of the deceased, it was warned by the plaintiffs, and the defendant then entered an appearance. The plaintiffs thereupon filed a declaration propounding the will. No plea had been filed, but the time for pleading had not expired.

Searle (Jan. 29) moved for leave to cite the defendant, as heiress, at law, to see proceedings under the 61st section of the 20 & 21 Vict. c. 77, on the usual affidavit that the deceased was possessed of real estate which was affected by the will.

[SIR J. P. WILDE. A similar application was refused in *Moore* v. *Holgate* (1) on the ground that it was premature, no plea having been filed, and the validity of the will not being therefore in dispute.]

The entering of a caveat shews an intention to dispute the validity of the will. But even if the validity of the will is not disputed, the plaintiff is entitled to cite the heiress at law as soon as proceedings are taken for proving the will in solemn form; and, by filing a declaration, he has taken such proceedings. In the event of his not proceeding to prove in solemn form, but discontinuing contentious proceedings, and taking probate in common form, the citation would be inoperative, and the heiress at law would not be affected by the probate.

[SIR J. P. WILDE. The suit commenced by caveat, not by citation. It is a proceeding not by the executor but by the next of kin.]

The form in which the suit commenced is immaterial. It is sufficient that there is a proceeding pending for proving the will in

(1) Law. Rep. 1 P. & M. 101.

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solemn form. In *Domville* v. *Domville* (1), and *Baldwin* v. *Durrant* (2), citations were allowed to issue, although pleas had not been filed.

[SIR J. P. WILDE. I will look into the cases and lay down a rule for future practice.]

Cur. adv. vult.

Feb. 5. SIR J. P. WILDE. This is a question of practice, whether the time has arrived at which the plaintiff may issue a citation to the heiress at law to see proceedings? By the 61st section of the Probate Act there are two states of things in which the heir at law may be cited, the first being where proceedings are taken to prove a will in solemn form, and the second, where, in any contentious cause or matter, the validity of a will is disputed. It cannot be said that the will is at present in dispute in this case. The executors have propounded the will in a declaration, but no plea has been filed, and it is obvious that until a plea is filed it is impossible to say whether or not the validity of the will is in dispute. The mere entering of a caveat does not shew that there is any dispute as to the validity of a will, for it is often entered in order that the person entering it may have notice of the will being proved, without any intention of disputing it, and there is nothing to preclude him from withdrawing his opposition, and allowing the executors to take probate in common form. The validity of the will is not in dispute until the plea is filed.

The next question is, whether proceedings have been taken for proving the will in solemn form. The ordinary way of doing so in the ecclesiastical courts was by citation, but it is plain that it was not the only way; for when a suit commenced by caveat, and the caveat was warned, and an appearance entered, the next step was for the party upholding the will to propound it in a "common condidit," the first sentence of which set out that it was a "business of proving a will in solemn form of law." It is plain, therefore, that a will can be proved in solemn form without the issuing of a citation; and if the parties interested in opposing a will enter a caveat, I do not see how an executor can set about proving it in

(1) 4 Sw. & Tr. 17; 34 L. J. (P. M. & A.) 79.
(2) 27th of November, 1866. Not reported.

solemn form in any other way than by warning the caveat, and then filing a declaration.

What has been done by the executors in this case is quite consistent with an intention to prove either in solemn or in common form, and the Court cannot, therefore, tell from the proceedings hitherto taken whether they intend to prove in solemn form or not. Under these circumstances the Court must ascertain their intention from some other source. I think that if the executors make an affidavit that they intend to prove the will in solemn form, that will be sufficient, and the citation may issue. The ordinary citation to see proceedings recites that "it appears by an affidavit of &c., that there is now depending in our said Court a cause wherein the said is proceeding to prove in solemn form of law the alleged last will and testament of &c." I think the practice as to these citations under the 61st section should be the same. In future, therefore, when a suit is commenced by caveat, and the party propounding the will wishes to cite the heir at law, before plea pleaded, he must make an affidavit that he intends to go on and prove the will in solemn form.

Some previous decisions on this section were referred to. In *Domville* v. *Domville* (1) the citation was allowed to issue, but an affidavit was before the Court that the party propounding the will intended to prove in solemn form. In *Moore* v. *Holgate* (2) I cannot find that any such affidavit was made, or that the applicant rested his claim to the citation on the ground that he intended to prove in solemn form. It was rather on the ground that the validity of the will was in dispute. If there was such an affidavit, I think that decision cannot be upheld. In *Baldwin* v. *Durrant* (3) there was no question as to the validity of the will, but it was stated by counsel that it was intended to prove the will in solemn form.

For the future the rule will be as I have stated. It will not be necessary to wait until the time for pleading has expired before filing the affidavit.

Attorneys for plaintiff: *Taylor, Hoare, & Taylor.*
Attorney for defendant: *A. D. Smith.*

(1) 4 Sw. & Tr. 17; 34 L. J. (P. M. & A.) 79. (2) Law Rep. 1 P. & M. 101.
(3) 27th of November, 1866. Not reported.

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Feb. 12.

NEWCOMBE *v.* BELOE AND OTHERS.

Administration—Creditor for Funeral Expenses.

P. M. 222.

Administration with the will annexed, granted to a person as a creditor for funeral expenses, who had undertaken the funeral of the deceased, at the request of the universal legatee named in the will, upon his giving justifying security.

The Court will not grant administration to an undertaker as a creditor for funeral expenses, unless it is informed of the circumstances under which the expenses were incurred, and by whose authority the applicant undertook the funeral.

MARGARET RADCLIFFE, late of Liverpool, widow, deceased, died in September, 1865, at Wavertree, leaving a will dated the 27th of March, 1858, and thereof appointed C. H. Beloe and C. Botteret executors and universal legatees in trust, and her daughter Sarah Ashton Radcliffe universal legatee. Frederick Newcombe, a linen-draper in Wavertree, purchased the grave and undertook the funeral of the deceased, and his claim against the estate for funeral expenses was 36*l.* 11*s.* 3*d.* S. A. Radcliffe had become insane since the death of her mother, and is confined in a lunatic asylum at Liverpool. Citations had been personally served on the executors, calling on them to take probate, or to shew cause why a grant of administration with the will annexed should not be made to F. Newcombe as a creditor. A citation had also been served on the resident medical superintendent of the asylum of which S. A. Radcliffe was an inmate, calling on her to accept or refuse the grant. No appearance was entered to these citations. The estate consisted of four houses in Liverpool, of the annual value of about 50*l.*

Dr. Spinks (January 29) moved for a grant of administration with the will annexed to F. Newcombe as a creditor.

The Court declined to make the grant without further information as to the circumstance under which the debt was contracted.

Dr. Spinks (February 12) renewed the motion on a further affidavit by F. Newcombe, stating that immediately after the death of the deceased, her daughter, S. A. Radcliffe, desired him to purchase the grave and undertake the funeral, and promised that he should be paid out of the estate. There was a case (1) in which

(1) *In the Goods of Fowler*, 16 Jur. 894.

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Sir J. Dodson said that as applications by undertakers for grants of administration were beginning to multiply, he should not pass them in future without being informed by whose authority the debt was contracted. In this case the funeral expenses appear to have been incurred bonâ fide, at the request of the person interested under the will.

SIR J. P. WILDE. My attention was called by the registrar to the case, *In the Goods of Fowler* (1), where Sir J. Dodson is reported to have said that the person who gave the order for the funeral was responsible for the expenses, and the creditor must look to him for payment, and intimated that the grant would not be made to the applicant without an explanation of the circumstance under which the expenses were incurred. I have had the papers in that case looked at to see what was the result, and I find that the grant ultimately passed to the undertaker as a creditor. It appears that the person who gave the order for the funeral in this case is the residuary legatee, and that she is now a lunatic. I see no reason why, under these circumstances, the applicant should not take the grant as a creditor, and I decree administration with the will annexed to him accordingly. He must give justifying security.

Attorneys: *Gregory, Rowcliffes, & Rawle.*

(1) 16 Jur. 894.

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March 5.

In the Goods of CHAMBERLAIN.

Invalid Will—Duty of Executor as to revocation of Probate—Citation of Legatees to propound—Practice.

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form, or shew cause why the probate in common form should not be revoked.

The executor of an executor is in the same position in this respect as the original executor.

George John Chamberlain, late of Liverpool, died on the 20th of December, 1864, a bachelor, and a bastard. He left a will dated the 20th of December, 1864, probate of which in common form was granted by the district registry of Liverpool to John Davies, the executor named therein, on the affidavit of John Taylor, one of the attesting witnesses. The only persons beneficially interested under the will were Jeannette Riley, the deceased's illegitimate sister, and Mary Ann Elizabeth Kelly, otherwise Deakin, his illegitimate daughter.

John Davies died on the 10th of June, 1865, having intermeddled in the estate, leaving a will and codicil, which were proved in common form on the 24th of July, 1865, by Samuel Davies, one of the executors therein named. S. Davies intermeddled in his testator's estate.

Mrs. Kelly, otherwise Deakin, having taken proceedings in the Court of Chancery of the Duchy of Lancaster for the administration of the deceased's estate, a notice was sent in the course of the suit by her solicitor to the solicitor for Samuel Davies, that the real estate of the deceased, situated in the county of Chester, was claimed by Mr. Moreton as grantee from the Crown, on the ground that the alleged will of the 20th of December, 1864, was invalid, and that the deceased died intestate. S. Davies thereupon made inquiries as to the circumstances attending the execution of the will, and he came to the conclusion that it was invalid, the deceased having been insensible at the time when it was executed. He then took the probate into the registry, and applied for a citation calling upon the parties interested under the will to propound it if they thought fit, or to shew cause why it should not be pronounced null

and void, and the probate revoked. That application having been refused,

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February 26. *Dr. Spinks, Q.C.* (*Inderwick* with him), renewed it to the Court. The executor has a right to have the question of the validity of the will settled one way or the other, and if he is satisfied that it is invalid, he cannot be obliged to propound it in solemn form, and to uphold it. It can hardly be laid down that, because he has inadvertently taken probate in common form, he is bound to be a party to what he knows to be a fraud, by attempting to prove it in solemn form.

[SIR J. P. WILDE. It is the duty of an executor to prove a will. Having proved it, is it competent to him to take any active step for the purpose of having that probate revoked? There are many cases in which a man is estopped by his own acts from taking a course founded on a disavowal of those acts. Why cannot the executor propound the will, and cite the parties interested in an intestacy to oppose it?]

By so doing he would probably make himself liable to condemnation in costs. It cannot be his duty to propound the will collusively, and then to produce evidence that it is invalid. The proper persons to propound it are those who are really interested in upholding it.

[SIR J. P. WILDE. Why should he not propound the will, and then give notice to the legatees that it is to be opposed, and that he does not intend to take steps to support it unless they guarantee his costs? An executor ought not to be allowed to shake off the responsibility of the office he has undertaken by asking that a probate which has been granted to him should be revoked. He cannot make himself the instrument of the destruction of a will which it is his duty to uphold.]

It cannot be revoked unless evidence satisfactory to the Court of its invalidity is produced. He cited *In the Goods of Napier* (1); *In the Goods of Benbow* (2); *Stares* v. *Bowler*. (3)

Cur. adv. vult.

March 5. SIR J. P. WILDE. The applicant in this case is the executor of an executor, and he desires to be allowed to extract a

(1) 1 Phill. 83.

(2) 2 Sw. & Tr. 488; 31 L. J. (P. M. & A.) 171.

(3) Not reported.

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citation against the parties interested under the will of the original testator, calling upon them to propound that will in solemn form of law. His reason for so doing is, that he believes the will cannot be supported, and his object is to relieve himself from all further burthen in connection with it as executor.

The will in question was proved in common form by the executor appointed under it, and he intermeddled in the estate. The will of that executor has been proved by the present applicant as executor thereof, and he has intermeddled with his testator's estate under the probate.

It was pointed out in the argument, when this case was moved, that the position of opposing the will by which he was appointed executor was a novel one for an executor to occupy, and that the anomaly was increased by the fact of his having already taken probate of it. It was questioned by the Court whether he had not thus estopped himself from afterwards instituting proceedings to disaffirm the will.

To this it was replied that technical rules ought not to be paramount over the merits of the matter. That if the executor had (acting bonâ fide) discovered that the original was in law no will at all, no rule ought to stand in the way of his bringing that question to issue, and relieving himself of the burthen which his testator had improvidently undertaken. And if the matter rested on mere technicality or novelty alone, I should be much disposed to yield to this reasoning. But there is more in it.

It may be convenient to treat the question as if it had arisen with the original executor, and even before he had taken probate of the original will. The present applicant cannot be more entitled to extract the citation he asks for than the original executor would have been. The question then arises, in what right, and in the protection of what interest, would such executor have been entitled to cite the legatees to prove the will? I say in what right? for the citations issued by this Court are not, like the writs issued at common law, at the service of any one who likes to ask for them. It is an inherent part of the practice of this Court that every one, before extracting a citation, should shew in the affidavit which leads the citation the character in which he does it, and thereby the interest which justifies it. Now, the executor of the original

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will (whose executor the present applicant is) was, save for the will itself, a perfect stranger in the matter; he had no interest in an intestacy, and none under a former will. He had an interest under the will, because he was executor of it, but his title rested on the will, and stood or fell with it; and it would be a strange thing to hold that, because he was named executor if there was a will, therefore he had an interest in shewing there was not. The next step is more difficult still: for if he could not have cited the legatees before he took probate for want of interest, how can it be said that he obtained a legal interest in destroying the will, and thereby a right to cite them, by adopting the will and obtaining the grant of the Court? These considerations satisfy me that the present applicant has no interest such as the Court can recognise in calling the validity of the original will into question, and leave to extract the citation must be refused.

Solicitors: *Bower, Son, & Cotton.*

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March 12.

*Will of Married Woman—Power of Appointment—Subsequent Marriage—Later Will not revoking first Will—*1 *Vict.* c. 26, s. 18.

A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions.

Nor is a will made in the exercise of a power of appointment revoked by a subsequent marriage, when in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions.

A married woman executed a will in pursuance of a power therein recited, leaving all the property comprised in the power to her son. By a later will containing no recital of a power, and no words of revocation, she left all her property to her son. She was possessed of property other than that appointed by the first will, on which the second will could operate. Both the wills were included in the probate, as together containing the last will of the deceased.

Post 678
3 P.D. 155
2 P.D. 162.

CHARLOTTE FENWICK, the wife of George Howard Fenwick, died on the 11th of December, 1866, at Boulogne-sur-Mer, in France,

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leaving her surviving her husband and her son by a former marriage, Robert Joseph Langstaff Haviland, a minor, aged fifteen years.

On the 14th of August, 1855, the deceased, then being the wife of Robert Humphrey Haviland, duly executed a will in pursuance of the powers and authorities contained in an indenture therein recited, bearing date the 7th of November, 1840, and of every or any other power or authority, in anywise enabling her in that behalf, whereby she directed and appointed that the trustees for the time being of the said indenture should from and after the decease of her and of her father, Joseph Langstaff, stand possessed of the trust funds over which she had a power of appointment upon trust out of the dividends thereof to pay an annual sum of 100*l.* to her husband, R. H. Haviland, during his life, and after the decease of herself and of her father she directed and appointed that the trustees should stand possessed of the entirety of the trust funds, and the dividends and accumulations thereof, in trust for her son, R. J. L. Haviland, in case he should attain the age of twenty-one years, to be paid and transferred to him upon his attaining the age of twenty-five and not before. The will further contained provisions for applying part of the income of the trust funds for the maintenance and education and advancement of the child, and appointed George Croxton sole executor.

On the 4th of February, 1856, the deceased, then being the wife of R. H. Haviland, executed a codicil whereby she absolutely revoked the bequest of the annuity of 100*l.* to her husband.

Joseph Langstaff, the father of the deceased, died on the 6th of December, 1866, leaving a will and two codicils, dated respectively the 19th of May, 1853, the 6th of March, 1854, and the 10th of March, 1856. By the codicil of the 10th of March, 1856, he devised and bequeathed all his real estate and the residue of his personal estate to trustees upon trust, as to one moiety thereof, for such person or persons as the deceased, then Charlotte Haviland, notwithstanding her coverture, should from time to time by deed or will direct and appoint, and in case of her death without appointment, in trust for such person as Julia Jane Bennett, her sister, should appoint, and in default of appointment by the survivor, in trust for his heirs and next of kin. The said will and

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codicils were proved by the executors therein named. Certain portions of the residuary personal estate of Joseph Langstaff had been absolutely appointed and taken out of trust, but a small portion thereof still remained held by the trustees upon the trusts declared by the codicil of the 10th of March, 1856.

On the 5th of May, 1863, the marriage of the deceased with R. H. Haviland was dissolved by reason of his adultery and desertion. On the 17th of October, 1863, she was married to George Howard Fenwick.

On the 20th of November, 1866, the deceased, then being the wife of George Howard Fenwick, duly executed a will in the following terms:—"The last will of Charlotte Fenwick. I pray God to protect my son, body and soul, to a good old age. I bequeath all my property to my beloved son, except 150*l.* a year to George Howard Fenwick, my husband; my trinkets to my sister Charlotte Fenwick. N.B.—The 150*l.* a year to Mr. Fenwick are for as long as he lives, and to be returned to my beloved son."

Searle moved for probate of the will of 1855, of the codicil of 1856, and of the will of 1866, as together containing the last will of the deceased. The will of 1855 was not revoked by the subsequent marriage of the testatrix, because it comes within the exception in the 18th section of the Wills Act. In default of appointment, the property passes under the settlement; and even if it passes to the same persons who would take as the heirs, executors, administrators, or next of kin of the deceased, the exception applies, inasmuch as they take under the settlement, and not as heirs, executors, administrators, or next of kin: *In the Goods of Fitzroy.* (1) But, on reference to the settlement, it will be found that there are certain contingencies in which the property would not, in default of appointment, pass to the heirs, executors, administrators, or next of kin of the deceased, *e.g.* in the event of no child of the deceased, or of her sister, living to the age of twenty-one, one moiety of the property passes to J. Langstaff, the settlor, his heirs, executors, administrators, and assigns, and the other moiety to the deceased and her sister, or the survivor, and their heirs, executors, administrators, and assigns.

(1) 1 Sw. & Tr. 133.

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[SIR J. P. WILDE. I am satisfied that the first will is within the exception in the 18th section, and is not, therefore, revoked by the subsequent marriage. But is it not revoked by the will of November, 1866, which disposes of the whole of the property?]

The two wills are not inconsistent, for they are both in favour of the son. The question of revocation is one of intention: Williams on Executors, part 1, book 2, c. 3, s. 2 (1); *Stoddart* v. *Grant* (2); and it certainly cannot have been the intention of the deceased in executing the last will to revoke the appointment made by the previous will in favour of her son. But it is doubtful whether the last will is a valid execution of the power, inasmuch as the deceased was possessed of property on which it would operate other than the property comprised in the settlement, namely, her share in her father's residuary estate, and it may, therefore, be, that if probate of the first will is refused she will be held to have died intestate as to the property comprised in the settlement: 1 Jarman on Wills, p. 648 of 3rd ed.; *Andrews* v. *Emmott* (3); *Bennett* v. *Aburrow* (4); *Evans* v. *Evans* (5); *Shelford* v. *Acland.* (6) That is a question for the Court of Chancery to decide when all the papers are before it.

As to the practice of this Court in granting probate of different papers as together containing the last will of the deceased, he cited *In the Goods of Graham* (7); *In the Goods of Meredith* (8); *In the Goods of Joys* (9); *In the Goods of Merritt* (10); *In the Goods of Leese.* (11)

SIR J. P. WILDE. I am satisfied that the will of 1855 was not revoked by the subsequent marriage, being within the exceptions in the 18th section of the Wills Act. The next question is, whether it was revoked by the subsequent will. It is the duty of the Court, in cases of this kind, where questions arise as to the due execution of powers by married women, to see that every properly-executed

(1) P. 156 of 6th ed.
(2) 1 Macq. H. of L. 163.
(3) 2 Bro. C. C. 297.
(4) 8 Ves. 609.
(5) 23 Beav. 1.
(6) 23 Beav. 10.
(7) 3 Sw. & Tr. 69; 32 L. J. (P. M. & A.) 113.
(8) 29 L. J. (P. M. & A.) 155.
(9) 30 L. J. (P. M. & A.) 169.
(10) 1 Sw. & Tr. 112.
(11) 2 Sw. & Tr. 442. See also *Geaves* v. *Price*, 3 Sw. & Tr. 71; 32 L. J. (P. M. & A.) 113; *Richards* v. *Queen's Proctor*, 1 Ecc. & Adm. 235.

testamentary paper which may be material to enable the Court of Chancery to pronounce a judgment on such questions, should be laid before that Court. This Court should be very cautious in refusing to allow any duly-executed paper to form part of the probate which may be material for that purpose. It is abundantly clear, from the cases cited, that a question may be raised in the Court of Chancery whether the last will is a valid execution of the power contained in the deed of November, 1840; and on that ground alone I think that the first will ought to be included in the probate. I also think that the two wills should be included in the grant, on the authority of the case of *Graham* (1), which seems stronger than the present. Probate will therefore go of the will of 1855, and the codicil of 1856, and the will of 1866, as together containing the last will of the deceased, to G. Croxton, the executor named in the will.

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IN THE GOODS OF FENWICK.

Attorneys: *Torr, Janeway, & Tagart.*

IN THE GOODS OF MORGAN.

March 19.

Wills of Married Woman—Two Wills—Grant to all the Executors named therein.

Where probate is granted of two or more testamentary papers, as together containing the last will of the deceased, it is the practice to make the grant to all the executors named in the several papers.

Post 629.

FRANCES MORGAN, the wife of the Rev. C. A. S. Morgan, died on the 16th of February, 1865, leaving her husband surviving her. On the 16th of April, 1861, the deceased, then being the wife of the Rev. C. A. S. Morgan, made a will in the exercise of a power reserved to her by an ante-nuptial settlement, dated the 19th of April, 1837, and as to property subsequently acquired under or through the will of her brother C. F. R. Lascelles, in the exercise of a further power in that behalf given to her by an agreement dated the 22nd of November, 1860, whereby she appointed and bequeathed certain stocks, funds, and other personal estate to and amongst certain persons therein named, and appointed her husband and H. Jenner and W. H. M. Style, executors. Anna Lascelles,

(1) 3 Sw. & T. 69; 32 L. J. (P. M. & A.) 113.

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IN THE GOODS OF MORGAN.

the sister of the deceased, died on the 17th of August, 1863, leaving a will dated the 8th of December, 1860, which was proved by the executors therein named. Under that will the deceased became entitled to the dividends of 5000*l.* stock for her life, and to the residue of the estate and effects of the said Anna Lascelles for her own sole and separate use and benefit absolutely. On the 28th of January, 1865, the deceased duly executed a testamentary paper in the following terms:

"This codicil is the last will of me, Frances Morgan, wife of the Rev. C. A. S. Morgan, rector of Machen, in the county of Monmouth. I give and bequeath . . . . . my plate, linen, china, and furniture, and, lastly, I give and bequeath all the residue of the moneys, stocks, funds, securities, and other property settled for my separate use by my sister Anna Lascelles to my said husband, and I appoint him sole executor of this my will. In witness, &c."

Dr. Spinks, Q.C., moved for probate of the two testamentary papers of the 16th of April, 1861, and the 28th of January, 1865, as together containing the last will of the deceased to the Rev. C. A. S. Morgan, H. Jenner, and W. H. M. Style. There are two questions, first, whether both the papers should be included in the probate; secondly, in what form the grant should be made, whether of both the papers to the three executors, or of the first paper to the three executors, and of the last paper to the executor therein named.

[SIR J. P. WILDE. I have no doubt that both the papers are entitled to probate.]

With regard to the form of the grant, the proper course will be to make a separate grant of the second paper to the husband.

[SIR J. P. WILDE. Is there any case in which two separate grants of probate have been made of two papers, both being before the Court? I think it might be a more convenient course to make a separate grant in the form you suggest, but the registrar tells me that is not the practice. All the papers left by the deceased which are entitled to probate together constitute her last will.]

The last paper is in fact an independent will. He cited *In the Goods of Merritt* (1) and *In the Goods of Meredith.* (2) *In the Goods*

(1) 1 Sw. & Tr. 112. (2) 29 L. J. (P. M. & A.) 155.

of Lowe (1) is a different case from the present. There it appeared to be the intention of the testatrix to revoke the appointment of executors in the will by the appointment of a sole executor in the codicil, but in this case the appointment of an executor in the last testamentary paper is limited to that paper, and was not intended to revoke the appointment of executors in the will.

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IN THE GOODS OF MORGAN.

SIR J. P. WILDE. I think the probate of the two papers must be granted in the form prayed, namely, to the three executors, as together containing the last will of the deceased.

Attorneys: *Carlisle & Ordell.*

IN THE GOODS OF JANE BARDEN.

March 22.

Will limited to Real Estate—Appointment of Executor—Equitable Conversion—Practice.

A will limited to the disposition of real property only is not entitled to probate, although it contains the appointment of an executor, and the real estate is given to such executor, with directions to convert the same into personal estate.

JANE BARDEN (wife of Thomas Barden) died on the 14th of August, 1863, leaving a will made in pursuance of a power by which she devised certain copyhold hereditaments to her husband, upon trust to sell the same and invest the proceeds thereof at interest, and to retain such interest for his own use during his life, and, after his decease, upon trust that his executors or administrators should divide the principal amongst her children.

Thomas Barden, having survived his wife, died on the 10th of November, 1866, without having proved her will, or sold the said copyhold hereditaments, leaving a will, of which he had appointed his sons, Thomas Barden, Joseph Barden, and W. Coppard executors, to whom probate of the said will had been granted.

Dr. Swabey moved for administration of the effects of Jane Barden, with her said will annexed, to be granted to Thomas

(1) 3 Sw. & Tr. 478.

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IN THE GOODS OF BARDEN.

Barden, the son, as one of the substituted legatees named therein, and as the executor of Thomas Barden, the father. Although the will affected real property only, the grant might be made on the ground that there was an appointment of an executor, and that therefore the Court might presume that the deceased had personal property, which she desired her executor to administer. Again, if this were not a sufficient reason for making the grant, he submitted that it might be made upon the doctrine of equitable conversion, the real estate being directed to be sold, and converted into personalty. On the latter suggestion he could cite no case in point.

SIR J. P. WILDE. The Court is asked to allow the will of Mrs. Barden to be proved, on the ground that it contains the appointment of an executor. But in the case of *O'Dwyer* v. *Geare and Another* (1) it was held that this was not sufficient to give the Court jurisdiction over a will disposing of real property only. There is a suggestion that the Court might take notice of the doctrine of equitable conversion, and make the grant on this ground. That doctrine is one which has given rise, in the courts of equity, to decisions of great nicety, and distinctions of great refinement. And as you are unable to cite any case in which the doctrine of equitable conversion has been recognised as giving the Court jurisdiction over a will limited to real property, the Court will not now, for the first time, give it that operation.

Motion rejected.

Proctors: *Moore & Currey.*

(1) 1 Sw. & Tr. 465.

IN THE GOODS OF EMMA FRASER. 1867

Administration—Creditor of Person solely interested in Estate of Deceased—Renunciation and Consent—Probate Act, s. 73—Practice. *March 22.*

Where a person, being the sole party interested in, and the sole party entitled to represent, the estate of a deceased person, died without having taken out a grant to such person, and his personal representative had filed a renunciation and a consent to the grant being made to a creditor of the party so originally interested and entitled to the grant, the Court made the grant to such creditor under the 73rd section of the Probate Act, 1857 (20 & 21 Vict. c. 77).

EMMA FRASER died in 1854, a spinster and minor, leaving Thomas H. Fraser, her lawful father, her surviving. The only property she was entitled to was a sum of 336*l.* 10*s.* three per cent. annuities, payable on the death of her father, under the provision of his marriage settlement. The father died on the 25th of November, 1865, without having taken out administration to her estate, leaving a will and codicil, in which he appointed his wife, Mary Fraser, his sole executrix and universal legatee, and she took probate thereof. The father was indebted to Frederick William Price, in the sum of 988*l.* 2*s.* 6*d.*, for money advanced to him on the 5th of December, 1861, for which he held no security. The mother had not administered to the estate of her daughter, and had filed a renunciation of her right to do so, and a consent to administration being granted to Price, as a creditor of the father,

Dr. Tristram moved for administration of the estate of Emma Fraser to be granted to F. W. Price. This grant, if made, would be in conformity with the principle upon which the Court was in the practice of making grants to creditors of deceased persons—namely, that when all the parties entitled by the Statute of Distributions, or by interest, to the grant, declined or neglected to take it, the Court gave it to a creditor, because, if a grant were not made, there would be no one for him to sue, and he would thus lay out of his debt: *Webb* v. *Needham.* (1) So in this case, Mrs. Fraser was the only person entitled to the grant, but she declined to take it, and could not be

(1) 1 Add. 494.

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In the Goods of Fraser.

compelled to take it; and unless this application were granted, Price would remain out of his debt.

Sir J. P. Wilde. I will make the grant under the 73rd section of the Probate Act.

Proctors: *Brooks & Dubois.*

March 5.

In the Matter of the Petition of CHAPLIN.

Legitimacy Declaration Act (21 & 22 *Vict. c.* 93)—*Suit by Infant—Appointment of Guardian—Practice.*

P. M 118.

The Court refused to appoint a guardian to an infant, for the purpose of presenting a petition on his behalf for a declaration of legitimacy, until the matter had been referred to the registrar, to ascertain whether the institution of the suit was likely to be of benefit to the infant.

On the 17th of July, 1862, James Charles Chaplin, and his wife Sarah Katherine Chaplin, executed a deed of separation, wherein it was recited that there was no issue of the marriage, and whereby an annuity of 200*l.*, payable monthly, was secured to Mrs. Chaplin during their joint lives; Robert William Chaplin, the brother of James Charles Chaplin, was the trustee of this deed. After the separation J. C. Chaplin instituted a suit in the Divorce Court against S. K. Chaplin, and on the 22nd of January, 1867, a decree absolute dissolving their marriage was pronounced. J. C. Chaplin then presented a petition for an alteration of the separation deed, and filed an affidavit wherein he stated that there was no issue of the marriage. S. K. Chaplin filed an answer to the effect that as there was no issue of the marriage, the Court had no power to deal with the deed. Before that petition came on for hearing, notice was given of a motion on behalf of R. W. Chaplin for an order that he might be appointed guardian of James Charles Farrenden Chaplin, an infant under the age of seven years, for the purpose of taking proceedings on his behalf under the Legitimacy Declaration Act (1), and obtaining a decree that he is the legitimate son of J. C. Chaplin and S. K. Chaplin. In support of this application he filed an affidavit, setting out a certificate of the child's birth,

(1) 21 & 22 Vict. c. 93.

wherein it was described as the son of J. C. Chaplin and S. K. Chaplin, and a letter from S. K. Chaplin as to the child's birth.

Dr. Twiss, Q.C. (*Inderwick* with him), moved for an order accordingly.

The Queen's Advocate, for J. C. Chaplin, consented to the motion.

Dr. Spinks, Q.C., for S. K. Chaplin, opposed it. The child has no interest in obtaining a decree of legitimacy, and the only object of the application is to attempt to give the Court jurisdiction to deal with the settlement, by shewing that there is issue of the marriage. It is quite consistent with the affidavit that the child, if it ever existed, is no longer alive. If the applicant has any interest, it is in establishing the child's illegitimacy, but it is not competent to him to institute a suit for that purpose.

Dr. Twiss and *Inderwick*. The affidavit can be amended as to the fact of the child's existence. The applicant has an interest in ascertaining whether the child is his brother's heir at law and next of kin.

[THE JUDGE ORDINARY. Yes, but his interest is adverse to that of the child.]

They cited *In the matter of the Petition of Upton.* (1)

Cur. adv. vult.

March 5. THE JUDGE ORDINARY. I have considered what ought to be done in this case, and I find, on looking at the affidavit, that at present there is no information before the Court to justify it in making any order. There is no positive evidence that there is any child at all in existence.

But in order to save the parties unnecessary expense, I think it right to indicate the course I shall be prepared to take if the requisite evidence is supplied. The Legitimacy Declaration Act (2) was passed for the purpose of enabling persons to obtain from this Court declarations of their own legitimacy, and not for the purpose of enabling them to obtain declarations of other persons' illegitimacy. Not a word is to be found in it which will enable a person, in defence of his own interest, to bring to the test the question of an infant's legitimacy, with the view of proving him illegitimate. It

(1) 32 L. J. (P. M. & A.) 177. (2) 21 & 22 Vict. c. 93.

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RE CHAPLIN'S PETITION.

is very material to bear this in mind in dealing with an application of this kind.

The effect of the act being as I have stated, there is no doubt that an infant may claim the benefit of it by his next friend. But the question then arises, what course ought the Court to take when an application is made to it for the appointment of a next friend for that purpose. Is the Court to take it for granted that the application is a bonâ fide one, and made, as it professes to be, in the infant's interest? I think not. I find that when it is proposed to institute a suit in the Court of Chancery on behalf of an infant, it is the constant practice of that Court to refer the matter to the master, to ascertain whether the suit will be for the benefit of the infant or not. I think that is a reasonable mode of procedure, and I am prepared to follow it. If the application is renewed on further affidavits, I will refer the matter to the registrar, to inquire whether the proposed suit is likely to be for the benefit of the infant or not; and on his report I will determine whether the application shall be granted.

Attorney for R. W. Chaplin: *John Fraser.*
Attorneys for J. C. Chaplin: *Coombe & Wainwright.*
Attorneys for S. K. Chaplin: *Battye & Whitehouse.*

Jan. 15.

JINKINGS *v.* JINKINGS.

*Dissolution of Marriage—Leave to proceed without Co-respondent—Wife's confession of Co-respondent's Name—No Evidence against Co-respondent—*20 & 21 *Vict. c.* 85, *s.* 28—*Rule* 4.

The Court will allow a petitioner to proceed without making the alleged adulterer a co-respondent, where no evidence can be obtained against him, the only evidence that he is the adulterer being the wife's confession.

THIS was a petition by a husband for a dissolution of marriage. The petition alleged the birth of an illegitimate child whilst the petitioner and the respondent were living apart, and the adultery of the respondent with one Shephard. Affidavits were filed, shewing that the respondent had confessed that her husband was not the father of the child, and that Shephard, a farmer, was its father; that inquiries had been made of her mother, with whom she was living

at the time of the alleged adultery, and of other persons, but that no evidence could be obtained of any intimacy between her and Shephard.

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Searle moved for leave to proceed without making Shephard a co-respondent. If he is made a co-respondent, and there is no evidence against him, he will be entitled to be dismissed, with costs. If a petitioner is obliged to make every man a co-respondent with whom a respondent chooses to say that she has committed adultery, any respondent will have it in her power to inflict a great deal of trouble and annoyance on innocent persons.

THE JUDGE ORDINARY. I think that if a petitioner cannot obtain any evidence against a person with whom a respondent states that she has committed adultery, he ought not to be obliged to make that person a co-respondent.

Motion granted.

Attorneys for petitioner: *Nicholls & Clark.*

GATEHOUSE *v.* GATEHOUSE.

Feb. 12.

Desertion.

Desertion held to commence, not at the time when the husband and wife ceased to cohabit, but at the time when the husband made up his mind to abandon the wife and live with another woman.

THIS was a petition by a wife for dissolution of marriage on the ground of adultery coupled with desertion. The respondent did not appear. The cause was heard by the Judge Ordinary on the 1st of February.

Dr. Spinks, Q.C., and *Robins*, for the petitioner.

Cur. adv. vult.

THE JUDGE ORDINARY. The adultery in this case was clearly proved, but I had some doubt as to the desertion. The respondent, at the time of the marriage, in 1853, was in the medical profession, and his mother-in-law took a business for him, and went to live with

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him and his wife at the house where that business was carried on. In 1856, the husband absented himself for some months without giving any account of where he was going. It was suggested that what then took place constituted the commencement of desertion, because when he went back to his wife he did not stay. It turned out, however, that the reason why he did not stay when he returned was, that his mother-in-law thought that he was mismanaging the business and getting into debt, and would not allow him to stay. I am therefore clearly of opinion that what then took place did not constitute desertion. From that time his mother-in-law held him at arm's length. On the other hand, the petitioner took every opportunity she could get of meeting him, and being in his society, and corresponding with him. Several years passed by, during which he seems to have had no fixed place of abode or settled business. At one time he was surgeon in a ship going out to Australia; then he came back to England; but during all the time he kept up a communication with his wife. But for what occurred at a later time, I should be of opinion that there was no desertion. I find that the correspondence altogether ceased on the 27th of April, 1864. At that time he was living at a place called Laugharne, where he had taken a practice in January or February, 1864. Soon after he got there he began to commit adultery with a Mrs. Thain; and in August or September, 1864, she went to live with him as the mistress of his house. They have since cohabited as man and wife, and were found so living in Jersey as late as December, 1865. Soon after he bought his practice at Laugharne the respondent asked his wife to join him there, and it appears to me that she was willing, as she said she was, to do so. She made him promise, however, that if she went to his house Mrs. Thain, of whom she had heard something, should not be allowed to come there. But in April, 1864, some further information reached her as to the nature of his intimacy with Mrs. Thain, and she ceased to write to him. From that time he ceased to write to her, and he took no step whatever to offer her a home, still less to claim her society, and appears to have made up his mind to abandon her for Mrs. Thain. I think that constitutes desertion. The only remaining question is, whether it was continued for two years and upwards before the petition was filed.

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The desertion having commenced in April, 1864, and the petition having been filed in May, 1866, I think the desertion for two years has been proved.

Decree nisi, with costs.

Solicitor for petitioner: *H. Godden.*

ADAMS *v.* ADAMS AND COLTER.

March 1.

Dismissal of Petition—Connivance of Petitioner—Claim for Damages—Costs of Co-respondent.

A petition by a husband, and claiming damages from the co-respondent, was dismissed on the grounds of the connivance of the petitioner and condonation, and the petitioner was ordered to pay the co-respondent his costs, although the adultery of the respondent and the co-respondent was proved.

THIS was a petition by a husband for dissolution of marriage, and claiming damages. The respondent and co-respondent, by their answers, denied the charge of adultery. The respondent further alleged that at the time of the marriage the petitioner was well aware that she was the kept mistress of W. B. B.; that for seven years after the marriage she habitually committed adultery with W. B. B. at the various places of residence of the petitioner, with the consent and with the connivance of the petitioner; that if she had committed adultery with the co-respondent the petitioner had condoned it; and that he had conduced to it by his wilful neglect and misconduct, as thereinbefore set forth. The cause came on for trial before the Judge Ordinary by a common jury.

M. Chambers, Q.C., and *Gates*, for the petitioner.
Dr. Spinks, Q.C., and *Searle*, for the respondent.
Dr. Swabey, for the co-respondent.

The jury found that the respondent and the co-respondent had committed adultery; that the petitioner had connived at the respondent's adultery with W. B. B.; that the petitioner had condoned the respondent's adultery with the co-respondent; and they assessed the damages at one farthing.

THE JUDGE ORDINARY dismissed the petition.

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Dr. Spinks asked for an order for the respondent's costs.

Dr. Swabey asked for the co-respondent's costs.

The petitioner having made a claim for damages, which was entirely without foundation, the co-respondent was obliged to appear and protect himself against that claim.

THE JUDGE ORDINARY. The respondent is entitled to her costs as a matter of course. I think that, as the petitioner chose to claim damages, and as the circumstances of the case shew the whole proceeding to have been one which it was shameful to institute, the co-respondent is also entitled to his costs.

Attorneys for petitioner: *Robson & Co.*
Attorney for respondent: *C. Gammon.*
Attorney for co-respondent: *J. MacGregor.*

Feb. 19.

HANCOCK *v.* HANCOCK AND SMITH.

Practice—Delay in Prosecuting Suit—Rule to dismiss Petition.

The Court refused to grant a rule calling on a petitioner to shew cause why a co-respondent should not be dismissed from a suit for dissolution of marriage, on the ground that it had not been prosecuted with due diligence, but granted a rule nisi for the dismissal of the petition on that ground.

THIS was a petition by a husband for dissolution of marriage. The co-respondent had filed an answer, and issue had been joined.

Inderwick moved for a rule calling on the petitioner to shew cause why the co-respondent should not be dismissed from the suit, on the ground that it had not been prosecuted with due diligence.

THE JUDGE ORDINARY. I cannot dismiss the co-respondent on that ground, and allow the suit to proceed against the respondent. The proper course is to take a rule calling on the petitioner to shew cause why the petition should not be dismissed.

Rule nisi accordingly.

Attorney for petitioner: *G. Wetherfield.*
Attorneys for co-respondent: *Shaw & Co.*

HANCOCK (FALSELY CALLED PEATY) *v.* PEATY. 1867

Nullity of Marriage—Lunatic—Assignment of Guardian—Application for Adjournment of hearing of Suit. March 19.

Where a guardian ad litem had been duly assigned by the registrar to a lunatic, a petitioner in a suit for nullity of marriage, the Court declined during the hearing of the petition to adjourn the case on the application of the respondent, on the suggestion of the petitioner's recovery, and of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, and proceeded to determine the only issue raised by the pleadings, namely, whether the petitioner was of sound mind at the time of the celebration of her marriage.

In deciding whether a person has sufficient mental capacity to contract a marriage, the question for the Court is, whether the mind of the contracting party was diseased or not at the time of the contract, and if the evidence establishes that the mind was at the time of entering the contract diseased, the Court will not enter into the consideration of the extent of the derangement.

The Court, being satisfied by the evidence that the petitioner was not of sound mind at the time of the celebration of her marriage with the respondent, postponed pronouncing its decree, in order to give the respondent an opportunity, if so advised, of establishing the fact of the petitioner's recovery, and intimated that, if satisfied of her recovery, it would not pronounce a decree of nullity except at her instance.

The next of kin having delayed instituting the suit for three years, and the respondent having in the meantime contributed towards the petitioner's support, the Court made no order as to costs.

The guardian ad litem, after the lapse of three weeks from the delivery of the judgment, obtained a rule nisi for the respondent to shew cause why a decree of nullity should not be pronounced, and, the respondent not shewing cause against the rule, the decree of nullity was pronounced.

THIS was a suit for nullity of marriage, instituted by Thomas F. Hancock, as the duly assigned guardian ad litem of the petitioner Mary Ann Frances Coleman Hancock (falsely called Mary Ann Frances Coleman Peaty), a lunatic, against the respondent, Robert Augustus Peaty, for the purpose of setting aside a marriage celebrated between the said petitioner and respondent, on the 19th of August, 1863, on the ground of the petitioner's insanity at the time of its celebration. On the 31st of July, 1866, one of the registrars, on the affidavits of Mr. Thomas F. Hancock, the brother, and next of kin of the petitioner, and of her medical attendant and nurse, at St. Luke's Asylum, made an order in the following terms:

"Hancock (falsely called Peaty) v. Peaty.

"On reading the affidavit of Thomas Francis Hancock, sworn on the 27th day of July, 1866, and the joint affidavit of James Ellis

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and Harriet Newling, sworn on the 26th day of July, 1866, whereby it appeared that Mary Ann Frances Coleman Hancock, otherwise Peaty, is now a lunatic, or a person of unsound mind, and therefore by law incapable of acting in her own name, and that the said Thomas Francis Hancock is her natural and lawful brother and one of her next of kin, and that he is ready and willing to accept of the curation or guardianship of the said lunatic, for the purpose of instituting against Robert Augustus Peaty a suit for nullity of marriage, by reason of the said Mary Ann Frances Coleman Hancock being at the time when the said marriage was solemnized of unsound mind, and incapable of forming such a contract, the undersigned registrar of the principal registry of her Majesty's Court of Probate assigned the said Thomas Francis Hancock guardian of the lunatic for the purpose aforesaid."

A petition was then filed by Mr. Hancock, as the duly assigned guardian ad litem of the petitioner, alleging that the petitioner was of unsound mind on the day of her marriage. The respondent filed an answer denying this averment.

The case was heard before the Judge Ordinary alone, and occupied four days.

Jan. 25. *The Queen's Advocate*, and *Dr. Tristram*, appeared for the petitioner.

Dr. Spinks, Q.C., and *Searle*, for the respondent.

Jan. 30. On the close of the petitioner's case, *Dr. Spinks* asked for an adjournment. He was instructed that Mrs. Peaty was now of sound mind, and desired these proceedings to be discontinued. Mr. Hancock appeared here, and was only entitled to prosecute this suit as guardian of his lunatic sister, and upon her recovery his locus standi was gone, and the suit, if proceeded with, ought to be continued in her name. He proposed that the Court should appoint two medical men to examine her and determine her mental condition.

The Queen's Advocate opposed the application.

THE JUDGE ORDINARY. If the lady is, as suggested, now of sound mind, the Court will certainly not proceed to make a decree without her sanction; for if she is not a lunatic when the Court is

asked to pronounce a decree, there will be no longer any ground for Mr. Hancock's further intervention, and she must then judge for herself whether she will allow the suit to proceed to a decree. It would be very inconvenient to stop this inquiry at its present stage. There is no issue raised on the pleadings as to whether Mrs. Peaty is now of sound mind. The only issue raised is whether she was of sound mind at the time when her marriage took place, and this issue I am bound to go on with and try. The proper way to have raised this point would have been by a motion for the Court to vacate its order appointing Mr. Hancock guardian, on the ground of the lunatic's recovery.

The case then proceeded. The material parts of the evidence are stated in the judgment.

Cur. adv. vult.

March 19. THE JUDGE ORDINARY. This is a suit for nullity of marriage, promoted by the friends of Mrs. Peaty for the purpose of setting aside her marriage with the respondent. Mrs. Peaty herself is sworn to be a lunatic, and upon that ground her brother, in July last, obtained the sanction of this Court to his appearance on her behalf for the above purpose.

The marriage took place on the 19th of August, 1863, and it is now contended on behalf of the petitioner that at the time of that marriage Mrs. Peaty was of unsound mind. This is denied by the respondent, and is the sole question now before the Court. Evidence has been adduced on both sides, and the present function of the Court is confined to the decision of that question. The evidence clearly shewed great eccentricity in Mrs. Peaty during several years. This increased very much in the year preceding her marriage, and continued to do so up to that event. Within three weeks after her marriage she exhibited unquestionable signs of lunacy, and the question is, whether the disease which then shewed itself, and which had obviously been of a progressive character, had advanced so far on the 19th of August, the day of her marriage, as to render her unfit to contract matrimony.

Mrs. Peaty was one of several sisters, who lived with their uncle up to the autumn of 1862. At that time, owing to her eccentricity and rude behaviour to her uncle, Mrs. Peaty was desired by him

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to quit his house. In the November of that autumn she was guilty of conduct which can only be referred to derangement of mind, though, perhaps, only of a transient nature. She borrowed the clothes of her old nurse, and went in a state of frantic excitement to a medical gentleman named Corfe, entreating him to allow her to be placed in the Middlesex Hospital, because, as she said, she was pursued by some enemy. He told her that a hospital was no place of retreat, and was intended only for the sick; but she implored him to save her from those who were pursuing her, and to "incarcerate" her, as she called it, in the hospital, by way of security. The opinion of Dr. Corfe was that she was out of her mind, that her safety was by no means insured, that suicide was not at all unlikely, and that an asylum was the proper place for her. She appears, however, to have been taken to a relative named Nunn, and to have been placed there under the care of a nurse, who was told not to lose sight of her, and after three weeks she somewhat recovered. Thence she passed a portion of her time with another relative, named Walter Hancock. While there she exhibited another very common symptom of insanity, namely, a constant suspicion that her food was poisoned, and induced her sister to bring her wine into the house for her own consumption, because, she said, the wine there was poisoned. No reasoning on the part of her sister seems to have been capable of removing this belief. In the spring of the following year, 1863, she appears to have taken up her abode at the house of a Dr. Taylor, her uncle paying for her board. For the first six weeks she was there she was, according to the accounts of the witnesses, better; but after that the symptoms of insanity became more confirmed. It is needless to detail them all; it is enough to observe upon some of them. She often used to come downstairs in the morning with pieces of rag tied round her wrists, saying they were valuable bracelets, and she would continue to wear them for three or four days. She objected to wash her hands and face, saying that she was so clean and pure that they did not require washing. She used to write the names of surgeons on pieces of paper, and put them in the window to attract the attention of people passing by, and induce them to send surgeons to her. She used often to say that her food was poisoned, and she would keep pieces

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of bread that she said were poisoned for a month at a time. She used to say that Dr. Taylor's pupils had a plot against her. This continued up to the day of her marriage. She would come down into the room, bringing the workbox with her to keep it safe. Within three weeks of her marriage she began a drawing of a bridge. She said it was a bridge that she and her husband must pass under. Three nights before her marriage she sat three or four hours in a hip bath with no clothes on, and no water in the bath, and the only reason that she gave was, that she was looking at this bridge, which she had pinned up against the wall for the purpose. The night but one, or the night before her marriage, she began washing her clean clothes which had just come home from the wash over again, and she performed the same process with her new kid gloves. The night before her marriage she got up in the middle of the night and sat again for some hours in the bath, naked, but with no water in it. On the morning of the wedding, at the wedding breakfast, she said it was all a trap, and they were going to poison her with the breakfast. She was described by one of the witnesses, Mr. Tryon, a pupil of Dr. Taylor, as being worse the night before her marriage than he had ever seen her. At the wedding breakfast, when Dr. Taylor offered her sister, Mrs. James, some wine, she whispered that it did not signify what she drank, but she must mind what she ate, and she would tell her why when they got upstairs together. Now, it is impossible for the Court, in review of these facts, to doubt that this lady was the subject of insane delusions at the time of her marriage. The symptoms point to no other conclusion; they are not reconcileable with mere eccentricity; they continued up to the very time of the marriage, and exhibited themselves with as much or more intensity on the very night before the marriage, and the very day of the marriage itself, than they ever did previously. Three weeks after the marriage her insanity shewed itself in a still more positive manner. She ran away from her husband down to Brighton without any apparent cause, was with difficulty brought back by his father, and on her return to London exhibited such unmistakeable signs of lunacy, that steps were taken to place her in confinement; and as early as the 2nd of October, 1863, her husband signed a statement, to be forwarded to the

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Commissioners of Lunacy, with a view to her being placed under restraint, in which he stated that the attack of lunacy under which she was labouring had existed a month. She was placed in an asylum kept by Dr. Sutherland, at Fulham, and from that time until the commencement of this suit she has been continuously under restraint. The opinion of one of the medical men at St. Luke's Hospital, where she was confined for some time, was that she was a confirmed lunatic; the opinion of the other is that, though lunatic now, she may, in the course of years, recover.

It has been contended, on behalf of Mr. Peaty, that the conduct spoken to before marriage is referable to a certain uterine derangement to which she was subject, and there is no doubt that at the recurring monthly periods these symptoms shewed themselves with the greatest intensity. The condition of her mind in 1862, and very likely early in 1863, was probably sound at times; but, after the first six weeks at Dr. Taylor's house, her conduct seems to have been invariably so inconsistent with anything like a sound and healthy mental power, that the Court is unable to view her disorder as anything short of mania.

The evidence of the medical men tended to shew that the disturbance of mind involved in this uterine derangement would in its nature be probably progressive in intensity, and would culminate in insanity. The conduct of the lady favours this supposition in her case. But, whatever the cause, it seems clear at least that at these monthly periods, and when in this state of excitement to which she was then especially subject, she was not mistress of her own mind; and it does so happen, according to the testimony of Dr. Taylor and of the maid who attended her at his house, that the marriage took place about the period of one of these accesses. After making all allowance, therefore, for possible soundness of mind in the intervals between the monthly periods, it is still impossible to conclude that Mrs. Peaty was in that sound state of mind at the marriage in which alone a party is competent to contract matrimony.

It was strenuously argued also on the part of the respondent that a marriage duly celebrated was not to be lightly annulled, and it was rather hinted than asserted that a less degree of sanity would

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be sufficient to make a marriage valid than would be required for the making of a will, and for some other purposes. But the Court here has not, as in many testamentary cases, to deal with varieties or degrees in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness, or the decay of faculties in extended age. The question here is one of health or disease of mind; and if the proof shews that the mind was diseased, the Court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power.

The law upon this subject is clear and without difficulty. It is definitely stated by Lord Stowell in *Turner* v. *Meyers*. (1) "It rests upon the simple proposition," says Lord Stowell, "that marriage is a contract as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons." And it may surely be added that if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives. Again, it was urged that the Court would regard with extreme jealousy an attempt to set aside such a marriage as this, if coming from the opposite quarter. Would the Court, it was said, have listened to a petition from Mr. Peaty to declare his marriage void under similar circumstances? It is hardly necessary to investigate such a question in the present case. It may well be that cases might arise in which the husband should be shewn to have entered into the marriage contract with a full knowledge that the woman he was taking as his wife was insane; and in such a case it might be doubted whether he would not be estopped from coming into this or any other court to disaffirm his own act, and allege her to be insane whom, with a knowledge of all the facts, he had treated as sane, when it served his purpose to do so. I forbear to do more than glance at this question, because it does not arise in the present case. It only remains to say that I do not believe in this case that the husband was aware of his wife's real condition. He had been attached to

(1) 1 Hagg. Cons. 414.

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her for some years, and in former years had offered her marriage, which was prevented by the interposition of her uncle. After that period he saw but little of her, and especially during the autumn of 1862 and the spring of 1863; up, indeed, to the month of July, 1863, he had no opportunity of seeing her, or becoming acquainted with her conduct. In that month she renewed her acquaintance with him by letter, and from that time up to the day of his marriage he did not see her more than six or eight times. It may well be therefore that, though he thought her eccentric, he was not aware of the insanity which undoubtedly existed. And, in that view of the case, he has certainly been somewhat hardly treated; for her friends, who ought to have known better, stood by and assisted at the ceremony. They afterwards forbore to interfere and claim the custody of her person, as they are now doing, and for a period of three years they have allowed Mr. Peaty, though a man of moderate means, to take upon himself a large portion of the expenses connected with the support and treatment of his wife. He has fulfilled that duty with a rare and disinterested fidelity. But they have appealed at last to this Court to annul the marriage, in order that they may have the entire control of their sister's treatment, and I am bound to say, though not without regret, that they have established the incapacity to contract marriage on the 19th of August, 1863, which they have alleged.

I have already intimated that, inasmuch as Mr. Peaty asserts that his wife has now recovered, and is in a sound state of mind, I do not propose to make a decree until that question is settled; and if, upon investigation, he desires to have that question tried, the Court will give him every facility for the purpose.

The suit was commenced by the petitioner, who claimed to act in the wife's behalf, on the ground of her being incompetent to act for herself, as long ago as July, 1866; and it may well be that between that period and the present she may have recovered. If this should prove to be the fact, the Court cannot proceed to a decree except at her own instance. If the insanity remains, the Court will be prepared to act upon the conclusion that it has formed.

With regard to the costs of the present proceedings, the Court does not propose to make any order.

April 16. The *Queen's Advocate* (*Dr. Tristram* with him), moved the Court to pronounce a decree of nullity. An affidavit had been filed in support of the application, from which it appeared that the petitioner was still of unsound mind. Notice had been given to the respondent's solicitor of this application, and it was understood that it was not opposed.

THE JUDGE ORDINARY. The better course will be for you, in the first instance, to take a rule nisi for the respondent to shew cause why the rule should not be made absolute, to be returnable next Tuesday.

April 24. Upon the Court being moved to make the rule nisi absolute,

Dr. Spinks, Q.C. (*Searle* with him), for the respondent, stated that, in consequence of the present state of the petitioner's mind, the respondent was not in a condition successfully to resist the application, and that, this being so, he felt himself bound, though with deep regret, to submit to a decree being pronounced declaring his marriage with the petitioner to be null and void.

Decree of nullity pronounced.

Solicitor for petitioner: *S. Miles Benson.*
Solicitor for respondent: *Wm. Smith.*

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March 19.

YOUNG *v.* DENDY AND OTHERS.

Will—Real Estate—Jurisdiction of Court—Costs—Legatee—Leave to appear to apply to vary order for Costs—Insane Delusions—Question as to time of their appearance not satisfactorily shewn at Trial—Discovery of further Evidence—New Trial.

The Court has not jurisdiction to order costs to be paid out of real estate.

When the Court made an order for the payment of the costs of a defendant who was interested in the residue, and had unsuccessfully contested the validity of a will, out of the estate, and it afterwards appeared that the residue was insufficient to meet the defendant's costs, and that unless the order was varied, a specific legatee who had not appeared at the trial would have to contribute towards those costs, the Court allowed the legatee to enter an appearance in the cause to enable him to move the Court to vary the order.

When the only material question at issue was whether the deceased, who was proved to have been subject to insane delusions, was subject to them at the date of the will, and the evidence of the plaintiff's principal witnesses negatived the existence of delusions at any time, and the defendant's witnesses were unable to fix the date of their first appearance, and the defendant after the trial (which terminated in a verdict in favour of the will) discovered evidence tending to throw further light on the question; the Court being of opinion that the matter had not received that full investigation and final solution on which it was proper to found a decree, granted to the defendant a new trial upon payment by him of the plaintiff's costs of the former trial.

THE two material questions originally raised in this suit were,—first, whether Miss Anne Alicia Julia Dendy, late of Feltham, in the county of Middlesex, was of sound disposing mind on the 19th of November, 1859, the date of the will propounded; and secondly, whether, assuming her to have been then of sound mind, and the will so to have been valid, certain alterations and interlineations apparent on the face of it, by which a real estate called the Sheppy Farm originally devised to her cousin Miss Daubeny, and in the will as altered devised to her cousins Miss Page and Mrs. Rowden, were entitled to probate.

The will was propounded by Heathfield Young, the executor, and a legatee named therein, and its validity was contested by the defendant Arthur Hyde Dendy, the deceased's brother, and one of her next of kin and her heir-at-law, on the ground that the deceased was at the time of its execution the subject of insane delusions. Miss Daubeny, and also Miss Page and Mrs. Rowden,

had been cited to appear in support of their respective interests under the will, and Miss Daubeny had propounded the will in its original form, alleging that the alterations and interlineations were made subsequent to its execution; and the two latter propounded the will as altered, alleging that the alterations and interlineations were made prior to its execution.

The plaintiff and all the parties cited joined issue with the defendant on his plea, denying the capacity of the deceased, and of the parties cited Miss Daubeny joined issue with Miss Page and Mrs. Rowden as to the time when the alterations and interlineations were made.

Dec. 15, 1866. The questions at issue came on for trial before the Court and a special jury.

The evidence adduced for and against the will at the trial was in substance shortly as follows:—The deceased, who from childhood was of eccentric habits and manners, had resided after her father's death in 1846 with her mother. In 1855 she went with her mother to reside at Feltham, to be near an imbecile sister, who was living there under the care of two old family servants, Mr. and Mrs. Harris. In June, 1857, during her mother's life, she made a holograph will, giving Mrs. Harris a legacy, but leaving her residue undisposed of, which will was proved by the defendant after her death, on the assumption that it was her only and last will. In 1858 her mother died, leaving a will dated June 28, 1858, by which she devised and bequeathed to the deceased the Sheppy Farm, valued at about 8000*l.*, and personal property of about the same value, and appointed her and the plaintiff her executors. On the 19th of November, 1859, she executed the will propounded (which was holograph, and prepared by her on the previous evening) in the presence of three witnesses, all of whom deposed to her capacity at the time of execution; and by it she gave her imbecile sister a life interest in the bulk of her personal estate,—4500*l.*, which, after her death, was to go to the plaintiff,—and charged the Sheppy Farm with the annual payment of 50*l.* for her use during life, and gave her uncle Robert Page a specific legacy of 1000*l.* and any small sum remaining in the bank after her funeral expenses had been paid. She also gave her shares in the New River Com-

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pany to Mrs. Harris, who died in her life, but the will conferred no benefit on the defendant. It was proved that although the deceased had through life been eccentric, and of slender capacity, she had always had the management of her own affairs, and several sensible letters on matters of business, written by her both before and after the execution of the will propounded, were put in evidence. It was also proved that the defendant had, both before and after the date of the will, treated her as competent to manage her own affairs. The deceased was burnt to death on the 19th of February, 1866. On the 17th of March, 1866, the defendant proved her will of 1857. In the month of April, 1866, the will propounded was discovered, whereupon the probate of the former will was called in, and the following month a mass of papers was discovered by the defendant, with writing sworn to be in the deceased's hand, manifesting delusions respecting the plaintiff and other persons, and on various other subjects. These papers were put in evidence by the defendant in proof of the deceased's insanity, but he was not able to shew that any of them were written before the date of the will.

It was suggested by the parties who supported the will, that it was highly probable that they were written in 1861, during which year the deceased had an attack of low fever, which had certainly for a time disturbed her mind. For the defendant it was suggested, that owing to the great mass of these papers, and to certain extraordinary behaviour of the deceased said to have happened before the date of the will, the presumption was that some of them at least were written prior to its date.

Dr. Deane, Q.C. (with him *Dr. Swabey*), appeared for the plaintiff, and addressed the jury on the issue as to capacity.

M. Chambers, Q.C. (with him *Dr. Spinks, Q.C.*, and *Gates*), for the defendant, addressed the jury on the issue as to capacity.

The Queen's Advocate (*Sir R. Phillimore*) (with him *R. E. Turner*), for Miss Daubeny, did not call witnesses, and addressed the jury on the issue as to capacity and the alterations.

E. James, Q.C. (with him *Dr Tristram*), for Miss Page and Mrs. Rowden, also addressed the jury as to both issues.

The jury (with the concurrence of the learned judge) found a

verdict in favour of the deceased's capacity at the date of the will, on the ground that there was no evidence to shew that any of these papers were written prior to its execution, and also found that there was no evidence to shew when the alterations and interlineations in respect of the Sheppy Farm were made. The Court thereupon pronounced for the will without the alterations and interlineations.

Dr. Deane, Q.C., on behalf of the plaintiff, applied to the Court to order the plaintiff's and defendant's costs to be paid out of the estate, stating that the residue was undisposed of, and suggested that the costs of the parties cited in respect of the Sheppy Farm ought not to be borne by the personal estate, but should be paid out of the Sheppy Farm.

R. E. Turner asked for Miss Daubeny's costs to be paid out of the personal estate.

Dr. Tristram applied for an order for the costs of Miss Page and Mrs. Rowden to be paid out of the Sheppy Farm. They had been brought there by the act of the testatrix, and it seemed equitable that the costs of the litigation in respect of real estate should be paid out of the real estate. The Court had never yet made an order for payment of costs out of real estate, and the Probate Act had not expressly conferred on it jurisdiction to do so. But as it had conferred on it jurisdiction to decide on the validity of wills in so far as they related to real estate, and to decree a probate binding the real estate, it must be assumed by implication to have conferred on it jurisdiction to bind the real estate in the same suit as to costs, the question of costs being incident to the principal subject of inquiry: see also s. 20 of Probate Act.

SIR J. P. WILDE. I am prepared now to make an order (by consent) for the plaintiff's and defendant's costs to be paid out of the estate, and will take time to consider whether I have jurisdiction to make an order for costs to be paid out of the real estate.

Cur. adv. vult.

Jan. 29, 1867. SIR J. P. WILDE. Upon consideration, I am of opinion that I have no jurisdiction to order costs to be paid out of real estate.

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Dr. Tristram applied for leave for Mr. Robert Page, one of the principal legatees in the will, to enter an appearance in this cause, in order that he might be in a position to move the Court to vary the order made in reference to costs, by directing that after the payment of the plaintiff's costs the defendant's costs should be paid out of the residue only (if any remained). The order, as made, was to the prejudice of Mr. Page, was obtained without notice to him, and without putting the Court in possession of certain facts material to the right determination of the question. Mr. Page deposed that he had not intervened in the original suit, because three parties had appeared to support the will; that the residuary personal estate amounted to about 180*l.* only; and that the New River shares (which were worth about 600*l.*) being real estate had lapsed to the defendant, and that the plaintiff's and defendant's costs were estimated at 1500*l.* The residue being insufficient to meet the plaintiff's costs, unless the order were varied as prayed, Mr. Page's legacies would be mulcted for a proportion of the defendant's costs. If these circumstances had been brought to its notice, the Court would never have made such an order, to the prejudice of the specific legatee without his consent.

Dr. Spinks, Q.C., contrà. The application is without precedent. A specific legatee is bound by the acts of the executor, unless he appears separately. When he intervenes, he must take the cause as he finds it.

Cur. adv. vult.

The Court subsequently made an order in chambers giving Mr. Robert Page leave to enter an appearance in the cause in order to enable him to move the Court to vary the decree as to costs.

A rule nisi for a new trial was granted on the application of the defendant on the ground of the discovery of further evidence.

In support of the application several affidavits were filed, shewing that the deceased had committed various acts of alleged insanity prior to the date of the will, and which evidence only came to the defendant's knowledge after the trial.

Dr. Deane, Q.C., and *Dr. Swabey*, shewed cause against the rule.

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M. Chambers, Q.C., Dr. Spinks, Q.C., and *Gates*, were heard in support of it.

Cur. adv. vult.

Mar. 19. SIR J. P. WILDE. After maturely considering the facts of this case, I am of opinion that, if Mr. Dendy is willing to pay the costs of the plaintiff of the former trial, he ought to be allowed to lay the question of the testatrix's insanity before another jury.

In conformity with the usual practice, I forbear to prejudice this second inquiry by any extended remarks on the facts.

The case has this very remarkable feature, that, after the death of the lady whose sanity is in question, a number of paper writings, in her hand, were discovered, the contents of which writings manifested the existence of delusions and trains of thought utterly inconsistent with a healthy mind. From the moment these papers were produced the only question in the cause practically was, not was she insane, but when did she become so? This question has never been satisfactorily answered. For the evidence in favour of the will, and particularly that of the persons with whom she resided all the latter years of her life, went to shew that she was of sound mind to the last. There is a marked inconsistency here, which precludes the Court from considering that the matter has received that full investigation and final solution on which it is proper to found a decree. And as the evidence which has since been obtained tends to throw further light on this difficulty, I think it should be submitted to a second jury.

I must add that the new trial will not be extended to the question raised upon the alterations, and on that point of the case I think the two contending parties must pay their own costs.

Solicitor for plaintiff: *Robert Watson.*
Solicitors for defendant: *Field & Roscoe.*
Solicitors for parties cited: *M. Stokes & H. Gover.*

1867
June 4.

IN THE GOODS OF LADY CATHERINE SOMERSET (DECEASED).

Person entitled to a General Grant—Application for a Limited Grant refused—Rule 30.

Where the person entitled to a general grant of administration with the will annexed, was also an appointee by the same will to a fund of 2000*l.* in settlement, and the general estate of the testatrix, who died insolvent, did not amount to 5*l.*, the Court declined to make a limited grant to the appointee on the suggestion that, by taking a general grant, he rendered himself liable to be harassed with actions by the testatrix's creditors.

THE deceased died on the 25th of June, 1865, at Paris, a widow, leaving a will, dated the 18th of August, 1864, of which she appointed two executors, both of whom died in her life.

By her marriage settlement she, as surviving her husband, had power to appoint the balance of certain trust funds included in the settlement amongst the children of the marriage, and, by her will, she had appointed this balance, which amounted to about 2000*l.*, to her second son, the now only surviving child of the marriage, A. P. T. C. Somerset. The will also contained several specific bequests of plate, jewels, trinkets, none of which she was possessed of at the time of her death, and by it she gave all her personalty, linen, &c., to her said son. She died considerably involved, and the whole of her personal estate, exclusive of the sum over which she had a power to appoint, did not amount to 5*l.*

Inderwick moved for a grant of administration with the will annexed to be decreed to the said A. P. T. C. Somerset, limited to the fund appointed. In the registry an objection had been taken, under rule 30, to making a limited grant to the applicant, because he was entitled to a general grant, either as residuary legatee, or as the sole next of kin of the deceased, supposing the residue was undisposed of. A power was reserved to the Court by the rule to dispense with it, and it is now asked to do so, inasmuch as the deceased has practically left no general estate for him to administer to, and if he takes a general grant, he is apprehensive of being harassed with actions by the creditors of the deceased, and put to expense in pleading to them. But for the settled fund, there

would have been no obligation to prove the will, the estate being so small. 1867

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SIR J. P. WILDE. *In the Goods of William Watts* (1), Sir C. Cresswell stated that grants of this nature are entirely exceptional, and should not be made, unless a very strong reason is given. The grounds you have mentioned are not sufficient to justify a departure from the general rule. None of the rights of the applicant will be infringed by his taking a general grant. If claims are made against the deceased's estate, he will have no real difficulty in meeting them. The case of *William Watts* is against you, and I must reject your motion.

Solicitor: *Cundy.*

WISEMAN *v.* WISEMAN. 1866

Interest Suit—Unsuccessful Party—General Rule as to Costs—Exception to Rule. *Dec.* 11.

In interest suits the unsuccessful party is, as a general rule, condemned in costs.

But where the only issue raised was as to the fact of the marriage of the defendant, who gave to the plaintiff's attorney false information as to the place of her marriage, and whose own attorney, although in possession of the certificate of the marriage, returned no answer to two letters he received from the plaintiff's attorney asking for the production of the certificate to save further expense, and only produced it to him on the day of the trial, the Court refused to condemn the plaintiff, the unsuccessful party, in costs.

IN this case, letters of administration of the effects of William Cornelius Wiseman, of Serle's Place, Lincoln's Inn Fields, grocer, who died February 19th, 1865, intestate, were granted, on the 26th of April, 1865, to the defendant, Charlotte Wiseman, as his lawful widow and relict.

In May, 1866, Benjamin Wiseman, the plaintiff and brother of the deceased, cited the defendant to bring in these letters of administration, and to shew cause why they should not be revoked, on the ground that she was not the lawful widow of the deceased. They were brought in by the defendant, who propounded her interest, as widow, which the plaintiff denied.

(1) 1 Sw. & Tr. 538.

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WISEMAN v. WISEMAN.

November 29. The case came on for trial before Sir J. P. Wilde and a common jury, when the marriage register-book for the parish of St. Dunstan's, Stepney, was produced, in which there appeared the entry of the marriage in question as having taken place on June 30th, 1837, and the identity of the parties was clearly proved.

Dr. Tristram (*Francis* with him), could not resist the evidence of the marriage; but he submitted that the plaintiff ought not to pay costs, as he had been misled by a misstatement of the defendant respecting the place of her marriage, and as her solicitor, though applied to by letter, from the plaintiff's solicitor, on two occasions, for the production of the certificate of marriage, had not produced it until the day of the hearing.

Dr. Wambey (*A. E. Reynolds* with him), contrà.

Cur. adv. vult.

Dec. 11. SIR J. P. WILDE. This was an interest suit. The question at issue was, whether the defendant had been lawfully married to the deceased. After the suit was commenced, the attorney representing the deceased's brother, who calls in question the marriage, wrote a letter to the attorney for the defendant, dated the 5th of July, 1866, in a postscript to which he says:—"I understand from Mr. Baker, that Mr. Oliver Wiseman has stated to him that he has the certificate of his mother's marriage. If so, had he not better produce it, and prevent further litigation?" On the 6th of July, it appears that a certificate was extracted from the register by the defendant, for a certificate with that date was put in evidence by her; but no answer was sent to the application of the plaintiff's attorney. On the 24th of November, the plaintiff's attorney again wrote to the defendant's attorney, suggesting that heavy expenses would be saved if the defendant would name the time and place of her marriage. This letter met with no response until the day the cause came on for trial.

It also appeared from the evidence, that Mr. Walker, the clerk of the plaintiff's attorney, went to the widow and asked her where she was married, and, in answer to him, she gave the place of her marriage as Fingringhoe, Essex. A communication was opened

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by the plaintiff with Fingringhoe, but no entry of the marriage of the parties was found in the register-book there. In fact, the marriage really took place at St. Dunstan's, Stepney.

Under these circumstances, the evidence being entirely satisfactory to prove the fact of the marriage, the question arose whether the brother should be condemned in costs. It was argued that he should be dealt with on the principles applied in will causes to the next of kin. I have made inquiries, and I find that it was not the practice for the Ecclesiastical Courts to deal with the next of kin in interest suits, in the same way as they did when the contention had reference to a will. In interest suits, unless some special circumstance appeared, the party who failed to prove his case was condemned in costs. I shall follow that practice. The question then arises, whether, admitting that to be the ordinary rule, there are circumstances in this case to induce the Court to make it an exception to the rule. I think there are. The litigation has been caused by the misrepresentation of the widow, and by her attorney having, as it seems to me, purposely withheld information as to the time and place of the marriage. I think the necessity for incurring costs has been created by such conduct; and I shall make no order condemning the plaintiff in the costs. I may state that no such difficulty could have arisen in the Ecclesiastical Courts, because the certificate of marriage would have been annexed to the defendant's allegation, and the plaintiff would have known at once where the marriage took place.

Attorney for plaintiff: *Herbert Lloyd.*
Attorney for defendant: *W. W. Eaden.*

1867
Jan. 29.

SMITH AND OTHERS *v.* TEBBITT.

Testamentary Suit—Interest—Declaration of Deceased Party—Evidence.

When a deceased person is proved to have made a statement that another person was related to her—*e.g.* was her sister—she is to be presumed to have meant that she was related to her legitimately—*e.g.* was her legitimate sister—unless something appears to the contrary.

A recital in a deed executed by the deceased, making a provision for the defendant, in which the defendant was described as her sister, was held sufficient evidence to entitle the Court to find that the deceased and the defendant were natural and lawful sisters.

See at hearing post 390

THIS was a question of interest raised in a testamentary suit in which the plaintiffs, John Simms Smith, the elder, Samuel Smith, Richard Edmunds, Robert Arthur Brenan, and John Simms Smith, the younger, were applying for probate of a will of Mrs. Ann Thwaytes, late of Charman Dean, near Worthing, Sussex, deceased, as the executors named therein; and the defendant, Mrs. Sarah Tebbitt, was desirous of contesting the validity of the said will, as the only next of kin of the deceased. The defendant having entered a caveat, it was warned, and she thereupon entered an appearance as the natural and lawful sister, and only next of kin of the deceased. The plaintiffs then took out a summons for her to propound her interest, which she did in a declaration alleging, "that Joseph Hook, and his wife, Sarah Hook, many years since lawfully married, and had legitimate issue of such marriage, Samuel Joseph Hook, Sarah Hook, now Sarah Tebbitt, widow, the defendant, and Ann Hook, afterwards Ann Thwaytes, widow, the deceased in this cause. That Samuel Joseph Hook died a bachelor in January, 1790, and the said Ann Thwaytes died on the 8th of April, 1866, a widow, without child or parent, leaving the said Sarah Tebbitt, her natural and lawful sister." On the 17th of July, 1866, the defendant filed the following particulars to the above declaration, in compliance with an order made on summons. "That the said Joseph Hook and Sarah Hook, formerly Sarah Bailey, spinster, were married some time prior to the year 1788, but the precise place and date of such marriage the said defendant is unable to set forth. That after the said marriage, the defendant,

Sarah Tebbitt, being the lawful issue of such marriage, was born, to wit, on the 7th of January, 1788; but the place of her birth the said defendant is unable to set forth. That the said Ann Thwaytes, the deceased in this cause, being also the lawful issue of the said marriage, was born on the second of October, 1789, but the precise place of her birth the defendant is unable to set forth."

The plaintiffs filed pleas,

1. Denying that Joseph Hook and the woman alleged to be his wife, Sarah Hook, were lawfully married, or that they had legitimate issue of such marriage, Samuel Joseph Hook, or Sarah Hook, now Sarah Tebbitt, the defendant in this cause, or Ann Hook, afterwards Ann Thwaytes, the deceased in this cause.
2. Denying that the said Ann Thwaytes was the natural and lawful sister of the said Sarah Tebbitt.

Nov. 12, 1866. The defendant replied, joining issue on the plaintiffs' said first and second pleas.

Jan. 16. At the hearing of the case, the defendant, Mr. Robert Tebbitt Abbott, a member of the defendant's husband's family, who had known the defendant and the deceased for upwards of forty years, but had never heard the legitimacy doubted, Miss Webb, William Timbs, who had known the deceased and defendant since 1813, and had always understood they were sisters, were examined. A deed, executed by the deceased, dated the 8th of August, 1835, in which the defendant was described as her sister, and in which she made a provision for her; also certificates of the death of Samuel Joseph Hook, the brother of the deceased, and of her mother, were put in evidence. The evidence is sufficiently stated in the judgment.

The plaintiffs did not examine witnesses.

The Queen's Advocate (*Sir R. Phillimore*) (*Dr. Tristram* with him), submitted that, in conformity with the decisions, the defendant had established her interest as the natural and lawful sister of the deceased, to contest this will; citing *Lady Mago* v. *Brown* (1);

(1) 1 Lee, 271.

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Eaton v. *Bright and Sundland* (1); *Fownes* v. *Ettricke* (2); *Stote* v. *Tyndall* (3); *Kipping* v. *Ash* (4); *Queen's Proctor* v. *Williams.* (5)

Dr. Spinks (*Dr. Swabey* with him), for the plaintiffs. The evidence is insufficient to shew an interest in Mrs. Tebbitt. There is no proof that Mr. Hook ever existed; no proof of the cohabitation of father or mother, or of repute that they were husband and wife. The evidence merely shews that the two sisters lived with a Mrs. Hook, a single female, and were known as her daughters. To assume a marriage from the birth of children is going too far: Taylor on Evidence, p. 476, par. 517, edit. 1858. When it is said that the *possibility* of an interest entitles a party to oppose a testamentary paper, it is not meant that the slightest evidence of an interest will suffice; but that an interest, however remote, if proved or admitted, will do so.

Cur. adv. vult.

Jan. 29. SIR J. P. WILDE. This is a suit in which the plaintiffs are propounding a will of Mrs. Thwaytes, and the defendant has appeared to contest that will, and thereupon an interest suit arose by the plaintiffs calling upon the defendant to propound her interest, which she has done, alleging herself to be the natural and lawful sister of the deceased in the cause, and claiming a right as such to dispute the will as her sole next of kin; and the plaintiffs have by their pleas denied that right.

The issues that were joined on the pleadings in the interest suit were two. First, the plaintiffs denied that Joseph Hook, and the woman alleged to be his wife, Sarah Hook, were lawfully married, or that they had legitimate issue of such marriage, Sarah Hook, now Sarah Tebbitt in this cause, or Ann Hook, afterwards Ann Thwaytes, the deceased in this cause. Substantially, therefore, they deny that Joseph Hook and Sarah Hook were married, and that the deceased and the defendant were the daughters of the marriage. And the second issue is this: The plaintiffs deny that the said Ann Thwaytes was the natural and lawful sister of the said Sarah Tebbitt. This second issue is the all important issue in the cause,

(1) 2 Lee, 85. (2) 2 Lee, 257. (3) 2 Lee, 394. (4) 1 Robt. Ecc. 270. (5) 2 Sw. & Tr. 465; 31 L. J. (P.M.) 97.

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because, if that is made out, the other becomes immaterial for the purpose of the suit.

The defendant herself was called, and gave the history of her life as far as she knew it, speaking to a certain period of her life when she was some five or six years old. She is a person now very much advanced in age, being eighty; and the question which the Court has to determine is, first, whether there was any evidence to establish the fact of her relationship to the deceased; and secondly, whether that evidence was sufficient to satisfy the Court of the fact to which it was adduced. Now, independently of the evidence of the defendant herself, which probably would not alone have established the fact of her relationship to this lady, there was evidence tendered to the Court of this character. It appeared that Mrs. Thwaytes had always, according to the testimony of the defendant and others, treated her as her sister, and they had always called one another sisters, and had acted towards one another as if they were sisters, and believed one another to be sisters, and Mrs. Thwaytes acknowledged that relationship at all times and over a vast number of years. Mrs. Thwaytes having, by the death of her husband, which occurred in 1833, become a person of very considerable property, shortly afterwards executed a deed, as a voluntary act on her part, settling the life income in a sum of 30,000*l.* for the purpose of making a provision for the defendant as her sister, and upon which she has since been living. And in the recital to that deed and also in the operative words of it, the deceased has described the defendant as "her sister." Now, one of the rules of evidence that govern courts of law—and it is very familiar as a rule of evidence in pedigree cases—is, that the statement of a deceased relative of the family is evidence of pedigree. That rule is subject to some conditions. The first condition is, that the statement must have been made ante litem motam. Another condition is, that the person making the statement must be a person who is dead; but a prior condition to both of these is, that it should be proved, and by some source of evidence independent of the statement itself, that the person making the statement was related to the family about which she spoke. It seems to me that all these conditions are satisfied in the statement made by Mrs. Thwaytes in that deed; for, to begin with the first,

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of course she must have been a member of her own family. She is the person to whom relationship is to be proved, and every person must be a member of their own family, and therefore there was no objection to be made on that head. It was made ante litem motam. There is no question, thirdly, but that she is dead, and therefore it is the statement of a deceased person. It seems to me, therefore, that there is in that deed a piece of evidence which is perfectly legitimate for the proving of the defendant to be the sister of the deceased person. And I may go further at once, and say, that it is not only legitimate evidence for the purpose, but that it entirely satisfies me of the fact.

But then it is suggested, she may have been the illegitimate sister, and that the sister says nothing in the deed about legitimacy. That is quite true; but I think that that is a fault or a vice in the statement, which would probably apply to almost all the statements that have been admitted at all times under this head of evidence, because when people speak of a man or woman as their brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is the legitimate son or daughter, brother or sister, and therefore I think that objection fails.

I therefore hold the second issue to be proved. I do not know that it is necessary to say much about the other issue, because the second issue carries everything with it that is material for this case. But as to the other issue, which has reference to the marriage of the father and mother, I think the proof of that is more doubtful. I have no evidence on my notes that there ever was such a person as the father. There is a statement by Mrs. Tebbitt that her father's name was Joseph Hook. After her death, that in the same way would have probably been evidence of the fact, but while she is alive and gives a statement here, and on cross-examination admits that she never knew her father, and her father died long before she was old enough to know anything, I think that is not evidence on which the Court can rely. I do not, therefore, decide, and it is not necessary for me to do so, that the first issue is proved; but holding that the second is proved, the defendant will have all the benefit that she now seeks for.

The Court pronounced for the defendant's interest.

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The Queen's Advocate asked for the plaintiffs to be condemned in costs. The persons who have opposed the defendant's persona standi, are the very persons who represent the defendant's sister, who always acknowledged the legitimacy of them both.

Dr. Spinks. The defendant has failed to establish the first issue, which is the main issue, namely, whether these people ever had a lawful father and mother. This is quite a sufficient justification for the plaintiffs putting the defendant to the proof of her title.

SIR J. P. WILDE. The main issue is the second one. I think if the defendant proves she is the lawful sister of the deceased, that shews there must have been a lawful father and mother. The issue which is not proved, is whether the name of the father is Samuel, or that of the mother Sarah. That is a very minor matter. I certainly think the plaintiffs ought to be condemned in costs.

Proctors for plaintiffs: *Nelson & Son.*
Proctors for defendant: *Brooks & Du Bois.*

GOODACRE AND TAYLOR *v.* SMITH.

Jan. 22.

Costs—Unsuccessful Opposition to Will—Costs out of Estate—Knowledge and Approval of Contents.

A testatrix during her last illness made a will in favour of two persons who were strangers in blood. The will was in accordance with her previously expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, and it was not read over to her, and its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness:—

Held, that there was evidence that the testatrix knew and approved of the contents of the will, and it was pronounced for; but the costs of the unsuccessful opposition of the next of kin were allowed out of the estate.

THE plaintiffs propounded the will of Esther Hopkins Smith, widow, deceased. The defendant, a niece, and one of the next of kin of the deceased, pleaded undue execution, incapacity, and that the deceased did not know and approve of the contents. These issues were tried before Sir J. P. Wilde by a common jury, in No-

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vember, 1866. The deceased was a gold lace weaver in St. Luke's, Middlesex. Her estate consisted of a sum of 100*l.* and about 22*l.* worth of furniture. She was taken ill of typhoid fever in the beginning of March, 1865, and the will was executed at ten o'clock on the night of the 15th of March, and she died on the 17th of March.

Sir J. P. Wilde, in summing up, said, as to the issue of the deceased's knowledge and approval of the contents: "Before you find that issue for the plaintiffs you must be satisfied that the deceased at the time when she executed the will knew and approved of its contents. It is not enough to shew that on some former occasion, previous to the time of the execution, she had expressed an intention of doing what was done by the will."

The jury found a verdict for the plaintiffs on all the issues, and leave was reserved to the defendant to move to enter the verdict for the defendant on the issue of knowledge and approval of the contents.

Jan. 15. *Dr. Wambey*, and *Searle*, for the plaintiffs, moved the Court to pronounce for the will.

Dr. Tristram, for the defendant. There was no evidence to go to the jury on the third issue, for it appeared that the will was not read over to the deceased, and she was not informed of its contents at the time of its execution.

SIR J. P. WILDE. I had some doubt on the trial whether there was evidence to go to the jury on that issue, but I am now of opinion that there was, and the issue having been found for the plaintiffs, I shall pronounce for the will. Although the will was not read over to the deceased, and its contents were not brought distinctly to her notice at the time when she signed it, there was evidence that she had previously informed the attorney who had prepared it of her wishes as to the disposition of her property after her death, and that she gave instructions to Mrs. Goodacre to take to her attorney, adding that he knew her wishes. The evidence of the attorney was, that the will, as drawn up by him and executed by her, was in accordance with the instructions so brought to him, and with her previously expressed wishes. In

this indirect way, therefore, there was evidence that the testatrix was practically aware of the contents of the paper to which she set her hand. The rule laid down in *Barry* v. *Butlin* (1) applies to this case.

Dr. Tristram then moved for the defendant's costs out of the estate.

Dr. Wambey and *Searle*, contrà.

Cur. adv. vult.

Jan. 22. SIR J. P. WILDE. I postponed the consideration of the motion as to costs in this case in order that I might read over my notes. The facts were these: A woman named Smith died, having made a will whereby she left all she possessed to the plaintiffs, Eliza Goodacre and Louisa Taylor, strangers in blood, but who had worked for her for many years. There is no doubt, from various statements made by her, that she intended to leave them a considerable bequest, but whether she intended to leave them the whole of her property may be doubted. It appeared that, upon being seized with the illness which proved fatal, these two women came to her, and a few days before she died obtained this will from her. The will was drawn up by her attorney, but the instructions for it were given by the deceased to the plaintiffs, who were interested under it, in no one else's presence, and were taken by one of the plaintiffs, Mrs. Goodacre, to the attorney. Mrs. Goodacre brought back the will, drawn up from these instructions, to the deceased, and according to her own account she did not read it over to her, but said, "You know what it is," to which the deceased replied, "Yes." Thereupon one of the plaintiffs, Mrs. Taylor, held her up in bed, and the other, Mrs. Goodacre, guided her hand. That was the manner in which the will was made by which all the deceased's property was left to two strangers. I directed the attention of the jury to the suspicious circumstances of the case and the great care they ought to take in establishing a will so made, and they found in favour of the plaintiffs.

The testatrix had but few relations. She had two or three nieces, who, like the plaintiffs, had worked for her, and one of them continued to work for her for several years until work fell

(1) 2 Moo. P. C. 480.

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short. They visited her from time to time, and on the 7th or 8th of March one of them had an interview with her. At that interview the testatrix begged her to come again as often as she liked, and from that day until her death one or other of her nieces called every day, but none of them was ever allowed access to her by the plaintiffs. The nieces naturally complain that the testatrix was thus led to suppose that she was deserted by her relations, and on that account made a will excluding them from all share in the property. However that may be, the Court cannot regard the method of will making adopted by the plaintiffs, and their conduct in keeping the relatives away from the testatrix, as satisfactory. Under all the circumstances, I think the defendant's costs ought to be paid out of the estate.

Attorney for plaintiffs: *Proudfoot.*
Attorney for defendant: *Cotton.*

May 10.

BOWMAN *v.* HODGSON.

Proof of Due Execution of Will—Evidence of Attesting Witness.

The party propounding a will is bound to call one of the attesting witnesses to prove its due execution.

THE defendant propounded a will, dated the 29th of July, 1850, and two codicils, dated the 29th of July, 1850, and the 28th of February, 1851, of Joseph Hodgson, late of Brackenthwaite, in Cumberland, deceased, who died on the 29th of August, 1851. The plaintiff, one of the next of kin, pleaded undue execution, and that issue came on for trial before Sir J. P. Wilde and a common jury.

The attesting witnesses of the will and of the first codicil were William Hodgson and Rebecca Goodfellow, and those of the second codicil were William Goodfellow and Thomas Reay. William Hodgson, who was present at the execution of the three documents, but who did not attest the last codicil, was examined and proved the fact of their due execution. The Rev. Mr. Wood, who was also present at the execution of the three documents, but did

not attest either of them, corroborated his evidence. It was proved that Rebecca Goodfellow and Thomas Reay were dead, and that William Goodfellow was still living.

At the close of the defendant's case,

Dr. Swabey (*S. Temple, Q.C.*, with him), for the next of kin, submitted that the defendant was bound to call William Goodfellow the surviving attesting witness to the second codicil. He cited *Belbin* v. *Skeats.* (1)

Dr. Spinks, Q.C. (*Searle* with him), for the defendant, contrà. We have reason to believe that William Goodfellow will deny the due execution of all the documents propounded, and as it has been proved by two witnesses, who were present when they were executed, although neither of them attested the last codicil, we are not bound to call him. It is a question of evidence, and it is sufficient for us to satisfy the Court of the fact of the due execution of the codicil.

SIR J. P. WILDE. There is no doubt that at common law it was necessary to call the witness to a document in order to prove its execution. The Common Law Procedure Act of 1854 (2), s. 26, altered the rule to this extent—that a witness to a document, which does not by law require a witness, need not be called in order to prove it; but wherever a document is required by law to be attested, one of the attesting witnesses must still be called.

William Goodfellow was accordingly called by the defendant, and gave evidence against the due execution of all the documents, and some witnesses were called by the plaintiff to corroborate his evidence, but the jury found that they were duly executed.

The Court pronounced for the will and codicils.

Attorneys for plaintiff: *Gray, Johnston, & Mounsey.*
Attorneys for defendant: *Helder & Kirkbank.*

(1) 1 Sw. & Tr. 148.

(2) 17 & 18 Vict. c. 125.

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March 12.

STEED *v.* STEED.

Practice—Affidavit verifying Petition—Heading of Affidavit.

The affidavit verifying a petition must not be headed in a cause, but "In the matter of the Petition of ——."

THIS was a wife's petition for dissolution. The respondent appeared, but did not answer.

Searle moved for directions as to the mode of trial.

THE JUDGE ORDINARY. In this, and in many other cases, the affidavit verifying the petition is improperly headed. It is headed in the cause "Steed v. Steed;" but at the time when it was sworn there was no such cause pending, because no petition had then been filed, and no citation extracted. If it is entitled at all, it should be "In the Matter of the Petition of Emma Steed for a Dissolution of Marriage." The rule was so laid down by Sir C. Cresswell in *Gapp* v. *Gapp and Leverson* (1), and, I think, should be adhered to. The order for the mode of trial will be drawn up on the affidavit being amended.

Solicitors: *Surr & Gribble.*

(1) 28 L. J. (P. M. & A.) 48.

DRYSDALE *v.* DRYSDALE.
DRYSDALE *v.* DRYSDALE, CORBET, AND GANE.

1867
Jan. 15.

Cross Suits for Restitution and for Dissolution—Prayer for Relief in an Answer—29 Vict. c. 32, s. 2.

A decree of restitution of conjugal rights is not the relief for desertion contemplated by the 2nd section of the 29 Vict. c. 32; therefore a wife who filed an answer to a petition for dissolution of marriage, wherein she denied the adultery charged, and alleged desertion and wilful separation, was not allowed to add a prayer for restitution to the answer.

On the 24th of July, 1866, Mrs. Drysdale presented a petition for restitution of conjugal rights. Mr. Drysdale, in his answer, charged his wife with adultery, and prayed for a decree "that the said respondent be divorced, or at least judicially separated, from the said Caroline Drysdale, by reason of her said adultery." On the 4th of December, 1866, Mr. Drysdale filed a cross petition for dissolution of marriage, in which he alleged the same acts of adultery as were charged in the answer to the petition for restitution. Mrs. Drysdale filed an answer thereto, denying the alleged adultery, and charging desertion, wilful separation, and wilful neglect and misconduct. The two suits came before the Court upon motions for directions as to the mode of trial.

Dr. Spinks, Q.C., for the husband, moved that both the suits should be tried together.

Searle, for the wife, asked for leave to stay the proceedings in the suit for restitution, and to amend the wife's answer in the suit for dissolution by adding to it a prayer for restitution of conjugal rights. This being a suit instituted for dissolution, and the wife alleging that she is entitled to the relief of a decree of restitution on the ground of desertion, the Court has power to make such a decree upon a prayer in the answer, under the 29th Vict. c. 32, s. 2. (1)

(1) "In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, *or desertion*, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the Court may, in such suit, give to the respondent, on his or her application, the same *relief to which* he or she would have been entitled in case he or she had filed a petition seeking such relief."

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THE JUDGE ORDINARY:—By the original Divorce Act, "desertion for two years" was constituted a matrimonial offence, entitling the party aggrieved to judicial separation, or, when coupled with other offences, to divorce; and these remedies are, in my judgment, the "relief" at which the latter act points. I am, therefore, of opinion that restitution of conjugal rights was not the "relief" contemplated by the statute, and must refuse to allow the wife's answer to be amended as prayed.

An order was made, by consent, that the proceedings in the suit for restitution should be stayed until after the trial of the issues in the suit for dissolution, and that those issues should be tried by a special jury.

Attorney for Mrs. Drysdale: *J. T. Miller.*
Attorneys for Mr. Drysdale: *W. & H. P. Sharp.*

Feb. 5.

DENT *v.* DENT.

Sequestration—Practice—Pension of Retired Indian Officer.

Post 624
2 P. Wms. 55
3 PD 163

The Court has power to issue a sequestration, although no attachment had previously been issued.

The pension of a retired officer in the Indian navy received solely in respect of past services, held to be liable to sequestration.

THE wife had obtained a decree of judicial separation in this case, and an order had been made for the payment of 180*l.*, being the amount of her taxed costs, by the husband.

Dec. 18. *Pritchard* moved for a writ of sequestration, on affidavits that the costs had not been paid.

G. Browne, for the respondent, opposed the motion on two grounds: first, that a writ of sequestration could not be granted until after an attachment had issued; and, secondly, that the only property of which the respondent was possessed was his half pay as a retired officer of the Indian navy, and was not liable to sequestration.

Pritchard, in reply. It has been the practice of the Court to issue writs of sequestration without a previous attachment: *Clin-*

ton v. *Clinton*. (1) The income of the respondent is a pension, and not half pay.

THE JUDGE ORDINARY. I think the Court has power to grant a sequestration, although no attachment has been issued. The motion must stand over, in order that further affidavits may be filed informing the Court of the nature of the respondent's income.

Jan. 29. *Pritchard* renewed the motion, upon an affidavit setting out that information had been received from the Secretary of State for India to the effect that the respondent had formerly been a lieutenant in the Indian navy, which is now abolished, and that his pension was solely in respect of past services, and he was not liable to be called on to serve again. The distinction between half pay and a pension for past services is well understood, and has frequently been acted on. Half pay being partly in respect of future service cannot be sequestered for reasons of public policy; but a pension solely for past services is liable to sequestration.

G. Browne. The pension of a military or naval officer is given to him not only in respect of past services, but also to enable him to maintain his rank and keep up his position in society. It is entitled to exemption from sequestration on the same grounds as half pay.

The following authorities were cited: Daniel's Chancery Practice, p. 948, 4th ed.; *Wells* v. *Foster* (2); *McCarthy* v. *Goold* (3); *Knight* v. *Bulkeley* (4); *Spooner* v. *Payne*. (5)

Cur. adv. vult.

THE JUDGE ORDINARY. This case stood over that I might look into the authorities cited, with reference to the sequestration of a sum of money payable to the respondent, who was formerly an officer in the Indian navy, by way of pension for his past services. The authorities shew that a distinction is drawn between money which is received as half pay, and in respect to some extent of future services, and money which is received as a pension solely in

(1) Law Rep. 1 P. & M. 215.
(2) 8 M. & W. 149; 10 L. J. (Ex.) 216.
(3) 1 Ball & Beat. 387.
(4) 4 Jur. N.S. 527, and 5 Jur. N.S. 817.
(5) 2 De G. & Sm. 439; 1 De G. M. & G. 333.

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respect of past services. The distinction appears always to have been preserved, and the line between the two classes of income has been very definitely drawn in the cases cited. The respondent's income is one of the latter class, and the sequestration must, therefore, issue.

Proctors for petitioner: *Pritchard & Sons.*
Attorneys for respondent: *Meredith & Lucas.*

April 24.

WIGHT *v.* WIGHT AND FIELD.

Costs—Husband's Petition for Dissolution—Second Trial—Costs of First Trial.

On the trial of the issues in a husband's suit for dissolution of marriage, no witnesses were called by the respondent or the co-respondent; and the jury, being unable to agree, were discharged without giving a verdict. The issues came on for trial a second time, when witnesses were called by the co-respondent, and the jury found a verdict of not guilty. The Court refused to condemn the petitioner in the co-respondent's costs of the first trial.

THIS was a petition by a husband for dissolution of marriage. The respondent and the co-respondent denied the adultery charged in the petition, and the issues came on for trial in July, 1866, before the Judge Ordinary, by a special jury. Evidence was given in support of the petition: no witnesses were called by the respondent or the co-respondent, and the jury, being unable to agree, were discharged without giving a verdict. The issues came on for trial before the Judge Ordinary, by a special jury, a second time in March, 1867. On that occasion several witnesses were called by the respondent and the co-respondent, and the result was that the jury found that they were not guilty of the adultery charged.

Dr. Tristram, for the respondent, moved that the petition might be dismissed, and the petitioner ordered to pay the respondent's costs.

Tindal Atkinson, Serjt., for the co-respondent, moved that the petitioner should be condemned in the co-respondent's costs, including the costs of the first trial.

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Searle, for the petitioner. There ought to be no order as to the costs of the first trial. It is the practice in the common law courts to allow each party to pay his own costs of a trial which has proved abortive, by reason of the jury being unable to agree. No doubt this Court is not bound by the rules of the common law courts as to costs; but this is not a case in which it ought to exercise its discretion in the co-respondent's favour, inasmuch as the first trial was rendered abortive through his abstaining from producing the evidence upon which the second jury acted.

Tindal Atkinson. The jury having found that the co-respondent is not guilty, the expense of defending himself against an unfounded charge ought not to fall upon him. He cited *Nicholson* v. *Nicholson and Ratcliff*. (1)

THE JUDGE ORDINARY. There is no question that the petition must be dismissed, that the respondent must have her costs, and that the co-respondent must have the costs of the trial in which he has succeeded. The question remains, whether the Court ought, in the exercise of the large discretionary power as to costs conferred on it by the statute, to order the petitioner to pay the co-respondent's costs of the first trial, which was an abortive proceeding, because the jury could not agree to a verdict, and were discharged. That state of things often arises at common law, and when it does arise the costs on both sides are thrown away. I think that *Nicholson* v. *Nicholson and Ratcliff* (1) is no authority upon the case now in hand. In that case the husband had trumped up a false case of adultery against the wife, knowing it to be false. He produced witnesses to prove that they had seen her in the act of committing adultery, and the result was that he obtained a verdict. The wife afterwards moved for a new trial on the ground of surprise, and produced evidence which satisfied the Court and the jury that the petitioner's case was false, and she obtained a verdict; and the costs of both trials were ordered to be paid by the husband. This is an entirely different case. There was nothing in the evidence to lead the Court to suppose that the petitioner was setting up a case which he knew to be false, and suborning evidence for the purpose of proving it.

(1) 33 L. J. (P. M. & A.) 114.

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Fully admitting that the Court has a discretion in the matter, the question is whether it ought to exercise that discretion in the manner prayed. I am of opinion that it ought not, for the reason which has been suggested. On the first trial the petitioner called witnesses in support of his case, and the co-respondent appeared by his counsel, but called no witnesses. It is quite immaterial to inquire whether no witnesses were in attendance, or whether they were in attendance, but it was thought expedient not to call them. The result was that the case was allowed to go to the jury on the uncontradicted testimony of the petitioner's witnesses. I am not surprised that the jury had a difficulty in deciding the case on their testimony. On the second trial the co-respondent produced a mass of evidence, which was no doubt decisive of the question at issue. That evidence not having been brought forward on the first trial, I must refuse the application for the costs of that trial.

Solicitor for petitioner: *G. White.*
Solicitor for respondent: *W. Hall.*
Proctor for co-respondent: *Lochner.*

Nov. 20.

WILLIAMS *v.* WILLIAMS.

Alimony—Insufficient Answer—Statement of average Income.

An answer to a petition for alimony, setting out the average income of the husband for several years, and not setting out his income during the three years previous to the commencement of the suit:—*Held*, to be insufficient.

THE wife, in her petition for alimony, alleged that the husband derived a net annual income of 1000*l.* and upwards from the profession of an artist. The husband, in his answer, denied that he derived a net annual income of 1000*l.* from his profession, and alleged that his income was very uncertain and fluctuating, and that his average annual income since the marriage, which took place in 1859, was less than 435*l.*

Inderwick moved for an order for a further and fuller answer.

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setting forth particulars of the husband's income for the three years preceding the filing of the petition.

Dr. Spinks, for the husband. In the case of an artist whose income during any one year, or during any three years, may be derived from the sale of pictures which he has been painting for several years, it would not be fair to take his income in any one year or in any three years as his average income. His earnings are precarious, and the only fair way of arriving at his average income is to calculate it from the time when he began to practise his profession.

THE JUDGE ORDINARY. The answer is unsatisfactory, and must be amended. I can quite understand that to take any one year, or any particular number of years, as the standard of the husband's present professional income, might be unjust, and the Court does not propose to do so. But all that is asked is, that he should state what has been the amount of his income during the last three years at least. I think that is reasonable; but he will be at liberty, in addition, to set out his income during each of the nine years if he pleases, and also to state any circumstances which may account for his income being larger in one year than another. The Court has to ascertain, as well as it can, the amount of his present income, and any facts tending to throw light on that question should be stated.

Attorney for petitioner: *J. Bowen May.*
Attorneys for respondent: *Crosley & Burn.*

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April 18.

Will not forthcoming at Time of Death—Evidence as to its Existence at that Time—Presumption as to Revocation.

The presumption that a will in the testator's possession, and not forthcoming after his death, has been revoked, does not arise unless there is evidence to satisfy the Court that it was not in existence at the time of his death.

A will which had been in the testator's custody could not be found in his depositories after his death, but there was evidence of declarations recognising its existence up to within three weeks of his death; there was no evidence of any change of intention during those three weeks, and the only person who was

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interested in an intestacy had access to and made a search in the depositories before they were searched by any other person. Coupling these facts with the non-appearance of the person interested in an intestacy, the Court refused to presume that the will had been revoked, and granted probate of the draft.

P.D. 175.

JAMES FINCH, late of Sudeley Street, Islington, a retired cabinet-maker, died on the 6th of April, 1866, leaving two children: the plaintiff, Mary Esther Finch, and the defendant, William John Finch. The plaintiff propounded the contents of a will of June, 1865, whereby the deceased left all his property to her, and appointed her sole executrix. The defendant was cited, but no appearance was entered by him. The cause was tried by the Court without a jury.

Dr. Deane, Q.C., and *Ernst Browning*, for the plaintiff.

The value of the property was between 300*l.* and 400*l.* The due execution of the will was proved by the two attesting witnesses, Mr. Glaze, a law stationer, who prepared it, and Mrs. Evans. Mr. Glaze also proved that the draft propounded by the plaintiff was in the same words as the will. The plaintiff and the defendant resided in the same house with the deceased at the time of his death. After his death, the will was not forthcoming. The material parts of the evidence are stated in the judgment.

SIR J. P. WILDE. This case must be decided upon the same principle as that upon which the Court proceeded in *Podmore* v. *Whatton*. (1) There is no doubt that if a man dies, after duly executing a will, and at the time of his death his will, having remained in his custody, is not in existence, the law presumes that it was revoked. But in all such cases the question to be determined is, whether the will was or was not in existence at the time of the death. The Court had occasion to remark in *Podmore* v. *Whatton* (2): "A material question of fact has to be decided in this case before any presumption arises on either side; and it is this, Was the will found at the decease of the testatrix or not? If it was found at her death, and in an unmutilated state, then she did not revoke it. If it was not so found, then there is room and foundation for the revocation which the law will presume in the

(1) 3 Sw. & Tr. 449; 33 L. J. (P. M. & A.) 143. 10 Jur. N.S. 756

(2) 3 Sw. & Tr. at p. 451; 33 L. J. (P. M. & A.) at p. 144. 10 Jur. N.S. 757

absence of testimony to rebut it. In most cases, the solution of this question presents no difficulty, for the depositories of the deceased are duly searched by those whose good faith is not impugned, and who vouch for the fact one way or another."

But that difficulty does present itself in the present case, for the depositories of the deceased, before they could be searched by any independent person, were clearly accessible to, and are proved in evidence to have been investigated by, the only person who was interested in destroying the will, if it existed—namely, the defendant. The question is, whether the circumstance that the will could not be found after the defendant had access to, and had searched, the depositories, ought to satisfy the Court that it was not in existence when the testator died.

There is abundant evidence as to the making, and as to the due execution, of the will. It is proved by the plaintiff that, three weeks after it was made, the testator told her that he had made it, and had left her all his property. And that, on another occasion, about three weeks before his death, he expressed a fear that when he was gone her brother would turn round upon her, and said he had left all his property to her for that reason, and told her to administer within six months after his death. He also pointed out to her the particular drawer in which he kept the will, and said she might look at it if she liked.

The first question that arises on the evidence is, whether it leaves on the mind of the Court the conclusion that the testator continued in the same mind from the date of his will down to the time of his death. The evidence certainly points strongly in that direction, and there is nothing to shew any change of intention which was likely to lead to the revocation of the will. He had evidently not changed his mind when he last spoke to his daughter on the subject, and, as to the three weeks that elapsed between that conversation and his death, the evidence is a perfect blank. There is nothing to shew any change of intention, but there is evidence that, during that interval, he was not on good terms with his son, and that, although they were living in the same house, they did not speak to each other. Further, it was proved by Mr. Glaze, that when the will was made the testator said, "My son shall not have any of my money, for

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he is a very lazy individual." So stands the evidence as to what took place up to the time of the deceased's death, at half-past two in the morning. The son and daughter were in the room at the time of the death, and they both went into another room. Then come the most important facts. The plaintiff says, "About half-past nine in the morning, I met my brother coming out of the room where my father's dead body was lying. He went past me up to his own room. He appeared to have something concealed under his coat. He was holding one side of his coat with his hand. He went upstairs, and remained in his room about half an hour. When he came down, he said to me, 'I must administer the property.' I said, 'Why, father has left a will.' He said, 'If it is in your favour, you had better go and look for it.' I went with him into my father's room. He looked into the drawer, and said, 'There is no will here.' He opened the drawer. He had the key. The key was usually kept in the bottom drawer." I afterwards asked this witness some questions as to whether he took the key from the bottom drawer, before he opened the drawer in which the will had been kept, and she said she felt confident that he did not take it from the bottom drawer, but that he had it in his hand.

Now, if this evidence be true, it is obvious that this young man, while alone in his father's room, possessed himself of the key of this drawer, and, coupling that with the evidence of his leaving the room subsequently, as he did, a strong inference arises that he abstracted this will. But the Court is not bound to come to a conclusion one way or the other on that question. It is enough that the Court is satisfied that there is no proof that this will was not found in the depository of the testator. It is the non-existence of the paper at the time of death which leads to the legal presumption of revocation. A will is good unless revoked; but this will is not revoked, unless the legal presumption arises; and to support that presumption the Court must be satisfied that it was not in existence at the time of death. The evidence which has been produced does not satisfy the Court that it was not in existence at that time; on the contrary, looking at the expressed intention of the testator to leave the property to his daughter, and the fact that he continued to express that intention up to the last occasion when he spoke about the will, the Court is satisfied

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that his determination remained unaltered until the time of his decease. This conclusion is much strengthened by the circumstance that the defendant, although challenged to explain his conduct, does not appear here and submit himself to cross-examination. If he had appeared, he would have had an opportunity of explaining the fact of the key being in his possession when he searched the drawer, and the suspicious circumstances to which I have referred. The Court accordingly pronounces for the will, as contained in the draft proved by Mr. Glaze.

Dr. Deane. Will the Court condemn the defendant in costs?

SIR J. P. WILDE. I think I cannot, as he has not appeared.

Attorney: *T. W. Flavell.*

(1) Button v. King & Gilland, 2 Hagg. 280.

IN THE GOODS OF HUCKVALE.

May 14.

Will—Acknowledgment—Ignorance of Attesting Witnesses—Presumption of Due Execution.

A testatrix left a holograph will with a full attestation clause, also holograph, but the only signature was that embodied in the attestation clause, and it had apparently been inserted at some time subsequent to the writing of the attestation clause. The two attesting witnesses did not know whether or not the signature was on the paper when they subscribed their names. The Court held that it was at liberty to judge, from the circumstances of the case, whether it was probable that the signature was in the attestation clause at the time of the attestation, and, being of opinion that it was, granted probate of the will.

2 P. & M. 453.
3 P. & M. 36
175.
213.
1 P. D. 71
7 P. D. 101

ELIZABETH HUCKVALE, late of the city of Oxford, spinster, died on the 12th of March, 1867. She left a will, which was entirely in her own handwriting, and occupied one side of a sheet of foolscap paper. The last words of the will were the date, "June, 1864," and a blank was left before the word June, and the figure 4 was written on an erasure.

Then followed an attestation clause, also in the testatrix's writing, and the signatures of the attesting witnesses, in these words:—

"Signed by the said Elizabeth Huckvale, the testatrix, in the

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presence of us present, at the same time who in her presence have subscribed ourselves as witnesses.

"Frances Jane Brain.
"Maria Kimber."

There was no signature of the testatrix at the end of the will, except that occurring in the attestation clause. This signature had apparently been inserted after the attestation clause was written, in a blank space left for the purpose, into which it was squeezed with difficulty. In the right-hand corner of the paper, beneath the attestation clause, was the memorandum, also in the testatrix's handwriting, "Signed, 1865, Dec."

Frances Jane Brain, one of the attesting witnesses, made an affidavit, in which she deposed as follows: On an occasion, happening in the winter months of the year 1865, but the date whereof I am unable further to specify, I called at the house of the testatrix, with whom I was on intimate terms, and, after conversing with her for some time upon indifferent subjects, she said that she had made her will, and asked me if I would sign my name to it as a witness, to which I assented; and she then went out of the room, and on returning brought back with her the above-mentioned will. I asked her if it was dated, and she said it was, and she also said that there was no real necessity for her to make a will, as she was sure her mother and brother would carry out her wishes. She then said that there must be another witness, and she rang the bell, which was answered by her servant, Maria Kimber, whereupon the testatrix pointed out to me the place where I was to sign my name, at the foot of the attestation clause thereto, and I accordingly signed my name there, in the presence of the testatrix and of M. Kimber, all of us being present at the same time; and the said M. Kimber signed her name beneath mine, also in the presence of the testatrix and of myself. That no person save the testatrix, myself, and M. Kimber was present on such occasion. That the above is the effect of what the testatrix said on such occasion, but I am unable particularly to specify the words or expressions which she used.

Maria Kimber, the other attesting witness, in her affivadit, deposed: I was a domestic servant to Elizabeth Huckvale, the mother of the testatrix, with whom the testatrix resided. That I

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remember on one occasion, happening in the winter of the year 1865, but the date whereof I am unable more particularly to set forth, I went to the parlour to answer the bell, when I found the testatrix and F. J. Brain in the room together; and the testatrix pointed to the will, which was then lying upon the table, and told me that it was her will, and that she wished me to sign my name to it as a witness; whereupon F. J. Brain signed her name to the will, and I then signed my name beneath the signature of F. J. Brain, in the presence of the testatrix and F. J. Brain, all of us being present at the same time.

Both the attesting witnesses further deposed that the testatrix did not on such occasion, or at any other time, write anything whatsoever upon the said will in the presence of either of them; and referring to the dates appearing on the will, and to the name of the testatrix written in the attestation clause, they were both unable to depose whether the same had or had not been respectively written as they now appear previously to the execution of the will as aforesaid, and they did not observe whether there was or was not any blank for the day of the date thereof, or for the name of the testatrix, where the same now appears written in the attestation clause.

It further appeared by the affidavits that the will remained in testatrix's custody from the time of its execution until her death, that it was then found in her depositories, and that no other will or testamentary paper was found.

Dr. Spinks, Q.C., moved for probate of the will to the executor therein named. There is no doubt as to the intention of the testatrix, but the question is whether the Court can come to the conclusion that her signature was in the attestation clause at the time when the witnesses signed. He cited *Gwillim* v. *Gwillim*. (1)

SIR J. P. WILDE. I shall decide this case in conformity with the case cited, which is one of the latest, and which goes perhaps further than any of the former decisions on this point. In Williams on Executors (2) it is stated: "The result of the cases appears to be that where the testator produces the will, with his

(1) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.

(2) Part i. book ii. ch. ii. s. 2, p. 84 of 6th ed.

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signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature. But not where they are unable to see the signature, and the testator merely calls them in to sign without giving them any explanation of the instrument they are signing." One of the cases cited in the note to that passage is *In the Goods of Ashton.* (1) In that case the deceased did not acknowledge the signature, nor did either of the witnesses see him sign. Probate was refused, and Sir H. J. Fust said: "If the witnesses could have proved that the paper was signed by the deceased when produced by him, and when he requested them to sign it, that might have amounted to a virtual acknowledgment of the signature." In the later case of *Gwillim* v. *Gwillim* (2), which was founded on the decisions of the Privy Council in *Cooper* v. *Bockett* (3) and *Lloyd* v. *Roberts* (4), the principle of decision is thus stated by Sir C. Cresswell: (5) "If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper* v. *Bockett.* (3) The other case in the Judicial Committee to which I have alluded went a great deal further, because there the only surviving attesting witness denied the existence of a will at the time of the attestation. . . . . But from the whole circumstances of the case the Judicial Committee were perfectly satisfied that the will was there at the time, and that it was probably duly executed. That case goes a good deal further than this. I am therefore at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not."

The result is, that where there is no direct evidence on the point one way or the other, but a paper is produced to the witnesses, and they are asked to witness it as a will, the Court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from those circumstances, and from the appearance of the document itself,

(1) 5 N. of C. 548.

(2) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.

(3) 4 Moo. P. C. 419.

(4) 12 Moo. P. C. 158.

(5) 3 Sw. & Tr. at p. 204; 29 L. J. (P. M. & A.) at p. 33.

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whether the name of the testator was or was not upon it at the time of the attestation; and if it arrives at the conclusion that it was there at the time, the case falls within the principle of the decisions to which I have referred, and the execution is good. Applying that rule to this case, I have no doubt whatever that the testatrix's signature was there at the time of the attestation. The circumstances that the will is holograph, and that the attestation clause is holograph, and is full and complete, shew that the testatrix knew what was required to make a good execution. The signature, it is true, is in the attestation clause, but it is plain that it was not written at the same time as the attestation clause, but subsequently. The difference in the colour of the ink in which it is written, and its position, being squeezed with difficulty into the blank space left for it, make this evident. It is also proved that she asked the attesting witnesses to witness her will. The probability is therefore very strong that her signature was on the paper when the witnesses signed it. I have no hesitation in pronouncing that the will was duly executed.

I may add that there is a class of cases the circumstances of which are such as to exceed the limits of the rule laid down in *Gwillim* v. *Gwillim*. (1) One of those cases is *In the Goods of Hammond* (2), in which Sir C. Cresswell decided that where there was no evidence at all on the question whether anything had been written before the signature of the testator, the Court could make no presumption. To the same effect is *In the Goods of Pearsons*. (3) In both those cases the witness saw nothing but a blank piece of paper, and did not know anything about the nature of the instrument they were asked to attest. The circumstances of these cases seem beyond the limit to which the doctrine laid down in *Gwillim* v. *Gwillim* (1) ought to be carried.

Proctors: *Heales & Son.*

(1) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.

(2) 3 Sw. & Tr. 90.

(3) 33 L. J. (P. M. & A.) 177.

10 Jur. NS 372.

1867
June 25.

IN THE GOODS OF MARTIN.

Will not conditional.

A will in these words: "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina*, to the floating hospital ship *Berwick Walls*, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will and bequeath," &c.:—

Held, not to be contingent on the event of the testator's death in the illness from which he was suffering when the will was made.

WILLIAM MARTIN, late of Sunderland, a mariner in the merchant service, died on the 27th of July, 1866, at sea, leaving no known relations surviving him. He had made the following will:—

"I, the undersigned William Martin, native of Bremen, at this present time boatswain of the brig *Appellina*, of Sunderland, being at this date of sound mind and having the full use of all my mental faculties, but physically weak in health, have, at my own free will and desire, obtained permission from Captain W. F. Chambers to cease from all duty for a few days; and I wish, during such time, to be removed from *Appellina* to floating hospital ship *Berwick Walls*, in order to recruit my health. I also desire of my free will to defray out of my wages the expenses incurred, during my absence from duty, in respect of a substitute, and also charges for medical and hospital attendance and medicines; and, in the event of my death occurring during such time, I do hereby at my own free will, and at my express desire, will and bequeath to the Sunderland Orphan Asylum, in the county of Durham, England (after payment of my just debts), whatever wages or emoluments may be due at time of my decease, as also the proceeds of sale of all my goods, chattels, clothes, and effects belonging to me, and left on board said *Appellina*, and I make and attest to this will, having no kindred or family whatever. I also declare this to be my last will and testament, revoking all others previously made.—Shanghai, August 15th, 1865. William Martin. Witnessed by, and signed in presence of, W. F. Chambers, master. Witness, C. F. Biggins, mate of *Appellina*."

W. F. Chambers, one of the attesting witnesses, made an affidavit

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proving the due execution of the will, and stating that the deceased recovered from the illness from which he was suffering when the will was made; and that after his recovery he frequently referred to the will, and expressed his desire that after his death all his available property should be left to the Sunderland Orphan Asylum; and that the deceased was domiciled at Sunderland.

Inderwick moved for a grant of administration with the will annexed to W. H. Watson, Honorary Treasurer of the Sunderland Orphan Asylum, duly appointed under the corporate seal of the asylum, for the purpose of taking the grant. Although the Court cannot take into consideration the declarations made by the testator after his recovery from the illness during which the will was made, the will is not so clearly conditional in its terms as to justify the Court in refusing probate: *In the Goods of Thorne* (1); *In the Goods of Dobson* (2); *Roberts* v. *Roberts* (3); *In the Goods of Cawthron.* (4)

SIR J. P. WILDE. I am of opinion that this will is not conditional. I am satisfied that the testator, when he executed it, did not intend that it should be conditional.

Before the grant is made, all persons having or claiming an interest must be cited by advertisement, and the Queen's Proctor must be cited.

Attorneys: *Harle & Co.*

(1) 34 L. J. (P. M. & A.) 131.
(2) Law Rep. 1 P. & M. 88.
(3) 2 Sw. & Tr. 337; 31 L. J. (P. M. & A.) 23.
(4) 3 Sw. & Tr. 417; 33 L. J. (P. M. & A.) 46.

1867
July 23.

IN THE GOODS OF PEARSE.

Testamentary Paper—Several Sheets—One Sheet only attested.

1 P.D. 434,
15 L.T. 398

A testatrix wrote three separate lists of legacies on three separate sheets of paper, the first of which was headed "Codicil to the will of S. P." She signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents of the three papers to connect them with each other, and the first which was attested being complete in itself, the Court refused to grant probate of the two which were unattested.

SARAH PEARSE, widow, executed a will on the 23rd of April, 1866. She made a holograph codicil thereto, bequeathing various specific legacies to her children, her grandchildren, and some of her friends. These legacies were written on three separate sheets of paper. The first (marked A) was headed "Codicil to the will of Sarah Pearse, August 4th, 1866," and began with the words, "I give and bequeath," &c. The legacies were written on the four sides of the sheet, which were paged 1, 2, 3, and 4, and at the bottom of the fourth sheet were the signatures of the testatrix and of the two attesting witnesses. The second sheet (marked B) was paged 5, but was undated, and the writing was on the first side only. The third sheet (marked C) was not paged, but bore the date of the 9th of March, 1867, at the foot. The second and third sheets were signed by the testatrix at the bottom of the writing which they contained, but not by the attesting witnesses. Affidavits of the two attesting witnesses and of the daughter of the testatrix were filed, shewing that the three papers were signed by the testatrix at the same time, namely, on the 10th of March, 1867, in the presence of the attesting witnesses, and that after she had signed them she desired the attesting witnesses to witness them, and said that it would be quite sufficient if they attached their signatures at the end of the first sheet, and that there was no necessity to sign their names at the end of all three sheets, and that they accordingly only signed their names at the end of the first sheet.

Dr. Spinks, Q.C., for the executors, moved for probate of the will and the three sheets as together containing the codicil. The signature of the witnesses at the end of the first sheet is an attesta-

tion of the testatrix's signatures to the three sheets. He cited *In the Goods of Chamney.* (1)

Thesiger, for the children of the testatrix, who were residuary legatees under the will, consented to the application.

SIR J. P. WILDE. The Court must deal with the case according to law, without regard to any arrangement which the parties may make amongst themselves. The question is, whether the papers B and C are executed in conformity with the statute. Paper A is a complete testamentary instrument, with the signatures of the testatrix and of the two witnesses affixed to it in such a way as to make it apparent that they were attesting her signature. The question is not, as in the case cited, as to the position of the signatures of the attesting witnesses, whether they ought to be written in this place or in that, but whether they are so placed that the Court can perceive with reasonable certainty that they were written in order to attest the signatures of the testatrix appearing on the three papers. Paper B begins, "I bequeath to my dear son William Munro Pearse," and is signed by the testatrix at the end of the writing on the page. Paper C begins, "I give and bequeath to," &c., and runs on to the bottom of the page, and is signed by the testatrix. Now, it does not appear on the affidavit that papers B and C were in any way attached to paper A when they were signed, nor is there anything in the appearance or in the language of the papers from which it can be inferred that the three formed one document running on to the end of paper C. The witnesses saw her sign all three papers, but by her desire they attested only the first, viz. paper A. Now, a will to be duly executed must be signed at the foot or end thereof by the testator, and the witnesses must attest it in the testator's presence. How can I deal with these three papers as one document, at the foot or end of which the testatrix has affixed a signature, which has been duly attested? It is impossible to read papers B and C before paper A, so as to make paper A the end of the will, because the terms of the documents will not allow of such a reading. Paper A is obviously, as it is termed at the commencement, "a codicil to the will of Sarah Pearse," and from the subject-matter of the other papers, it is plain that they were

(1) 7 N. of C. 70.

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written subsequently to that paper being written. There is nothing except the oath of the witnesses to shew that the papers had any sort of connection with each other. I grant probate of the will and of paper A as the codicil, and I refuse probate of papers B and C. The parties are of course at liberty to propound them if they please.

Attorneys: *Ellis & Ellis.*

July 30.

IN THE GOODS OF ROBINSON.

Paper not Testamentary—Agreement not Revocable, and taking immediate Effect.

An agreement for a seven years' lease, duly executed and attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application:—

Held, that as no part of the agreement was revocable, and as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper.

Quære, whether the Court can grant probate of an instrument of which a part only is testamentary.

GEORGE ROBINSON, cattle dealer, died on the 22nd of January, 1867, leaving a will, dated the 8th of March, 1853, and a codicil thereto, dated the 15th of April, 1862, whereof he appointed John Pennell and Samuel Purser executors. On the 21st of April, 1864, the deceased signed a document by his mark, which was attested by two witnesses, and the question arose whether it was entitled to probate as part of the will. The document was in these terms:—

"An agreement between Mr. George Robinson and his grandson, Mr. William Phillips, both of the parish of Staunton, in the county of Worcester: I, the said George Robinson, on the first part, do hereby agree to let or set my grandson, William Phillips, a piece of land, commonly called Greenlays, containing six acres, more or less, in the parish of Staunton, in the county of Worcester, for the term of seven years, from the 2nd of February, 1864, at the annual rental of 12*l.* per year, to be paid by half-yearly instalments, on the 2nd of August and on the 2nd of February, to the aforesaid George Robinson. Should I, the said George Robinson,

die before the termination of the seven years, the rents of the aforesaid lands shall be regularly and punctually paid into the hands of my trusts, executors, or assignees, Mr. John Pennell, in the parish of Redmarley, in the county of Worcester, and Mr. Samuel Purser, in the parish of Staunton, in the county of Worcester, and placed in the bank, for the sole benefit of all my grandchildren, till the termination of the said William Phillips's tenancy; and I, the said George Robinson, do hereby order and empower my said trusts, executors, or assignees, at the termination of seven years from the 2nd of February, 1864, to lawfully sell by auction the aforesaid piece of land, for the sole benefit of all my grandchildren then living, and the proceeds derived or made therefrom, with the whole of the rents, to be immediately equally distributed among them, share and share alike; nevertheless, provided my grandson, William Phillips, wish to purchase the land at the termination of his tenancy, he shall be at perfect liberty to take free, full, and peaceable possession, with all the documents and writings belonging thereunto, by paying down to my trusts, executors, or assignees, with any and every expense, the sum of 250*l.* On the second part, I, the said William Phillips, do hereby agree to rent or take the aforesaid lands called Greenlays, for the term of seven years, at the rental before named, 12*l.* per year, and pay it by half-yearly instalments to my grandfather, George Robinson, while he liveth, and after his death to his trusts, executors, or assignees. Likewise I, the said William Phillips, shall have the privilege, should I think proper, of taking possession of the aforesaid lands, and all writings attached thereunto, at the termination of my tenancy, by paying, with any or all expenses, the sum of 250*l.* into the hands of my grandfather's trusts, executors, or assignees, and we hereby jointly sign.

"Witness this our hands, 21st day of April, 1864,

"The X of Mr. George Robinson,
"William Phillips,
"John Pennell,
"John Halford.

"P.S.—Should the said William Phillips remove the hedge adjoining the lane against Mr. Henry Hooper's land, and make a good hedge, the said William Phillips shall have the aforesaid

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piece of land called Greenlays at the annual rent of 10*l.* per year.

"The X of George Robinson,
"William Phillips.

"Dated this April 21st, 1864."

Mr. Purser, one of the executors, filed an affidavit, giving an account of the preparation of the document from the deceased's instructions, and stating that the deceased never spoke of it as a will or codicil, nor was it ever spoken of as a will or codicil in his presence.

Pritchard moved that this document might be included in the probate as a codicil to the deceased's will. It is of a testamentary character, although, as to some parts, it had an immediate operation: *Bagnall* v. *Downing* (1); *Doe* v. *Cross.* (2)

Cur. adv. vult.

July 30. SIR J. P. WILDE. The question in this case is whether a certain instrument, or a portion of it, is testamentary, and entitled to probate. The instrument is not in a testamentary form. It may be shortly described as an agreement between the testator and his grandson for a lease for seven years of certain property. But after the common agreement for a tenancy there follows a provision that, if during the seven years the testator should die, then the rent due from the tenant should be paid to certain persons mentioned, who are his executors, to be by them deposited in a bank for the benefit of all his grandchildren, and at the termination of the tenancy the property shall be sold by the executors, and the proceeds of the sale, and the dividends, shall be divided equally between his grandchildren. It is that portion of the document which is supposed to be of a testamentary nature.

The first difficulty that arises is, that the Court is asked to deal with a portion only of a document, and declare it to be testamentary. I have met with no case where that has been done, although I by no means say that it could not be done. But is the document in substance testamentary? The law on the subject is

(1) 2 Lee, 3. (2) 8 Q. B. 714.

fully stated in Williams on Executors (Pt. 1, bk. 2, ch. ii. s. 3, p. 99 of 6th ed.), and *The Attorney-General* v. *Jones* (1), in which the Barons of the Exchequer differed, and delivered elaborate judgments, is a very instructive case on the point. There are some tests which are applied in every case when a question is raised as to the testamentary character of a paper. One of these invariable tests is, whether the paper is revocable. Apply that test, and I think this application must fail, on the ground that the instrument in question is irrevocable in all its parts, not only as to the tenancy, but also as to the other provisions which were relied on as testamentary. The testator and his grandson entered into an agreement, and a court of law would hold that a portion of the consideration for the payment of the rent by the grandson was the provision as to the application of the rent if the grandfather died. The grandson had an interest in that application, for if the agreement were carried out he would be entitled to get back a part of what he had paid in the shape of rent. He had taken possession of the land, and it was impossible for the grandfather to revoke the agreement. On that ground alone I hold that the instrument is not of a testamentary character.

Further, the agreement was intended to take effect immediately upon its execution, and its effect was not to be postponed until after the grandfather's death. It does not require the death of the alleged testator for its consummation; on the contrary, it is a living active instrument, taking effect from the moment when the grandson took possession of the land. For these reasons probate of the document must be refused.

Probate refused.

Proctors: *Pritchard & Sons.*

(1) 3 Price, 368.

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July 30.

IN THE GOODS OF PINE.

Administration (Will) under 20 & 21 *Vict. c.* 77, *s.* 73—*Residuary Legatee a Married Woman—Residue Part of her Separate Estate—Grant to her Nominee without Notice to her Husband.*

3 P. M. 236
4 P.D. 86

Administration, with the will annexed, granted (under the 73rd section of the 20 & 21 Vict. c. 77) to the nominees of the residuary legatee, who was a married woman, without notice to her husband, the residue being settled to her separate use and at her absolute disposal.

ANNE ANTOINETTE PINE, of Fort William, Bengal, spinster, died in April, 1867, leaving a will of the 30th of January, 1832, whereof she appointed four executors, all of whom pre-deceased her. She appointed her mother, Anne Antoinette Pine, and her two sisters, Mary Jane Pine and Georgina, the wife of Henry Perry Cotton, residuary legatees, and directed that, in the event of one or two of them dying in her lifetime, the survivors or survivor should take the whole. The mother and one of the sisters, Mary Jane Pine, died in her lifetime, and Mrs. Cotton was the sole surviving residuary legatee.

An ante-nuptial settlement dated the 24th of March, 1828, executed in contemplation of the marriage of Georgina Pine to H. P. Cotton, contained the following amongst other covenants: that H. P. Cotton did for himself, his heirs, executors, and administrators, covenant, promise, and agree with the trustees of the settlement, their executors, administrators, and assigns, that if he in right of his intended wife, Georgina Pine, should become interested in and entitled to any such real or personal estate as should thereafter be given or bequeathed, or which should descend to the said G. Pine, he would permit and suffer the same and every part thereof to be and remain at her entire disposal, either for her own use or for the use of any other person or persons she should appoint; and that for the better effecting that purpose he would join with her in conveying, assigning, and assuring all such real and personal estate as should thereafter descend to, or be given and bequeathed to her during her coverture, according to the nature and quality of such estates, for her sole and separate use and behoof, to be held at her free disposition, and so that the same

and every part thereof should not be in anywise subject to his debts, contracts, engagements, intermeddling, or control; and for that purpose it was declared and agreed that her receipt, or that of her assigns, should be a sufficient discharge for such moneys as should be received by her; and further, that he would, after the marriage, permit and suffer her at her own discretion, and according to her own free will and pleasure, and for her own separate use and benefit, to sell, exchange, or dispose of, such real or personal property as aforesaid, at any time or times during her life, and to give or bequeath the same, or any part thereof, by her last will and testament, to any person or persons whomsoever, and to name or appoint any executor of or concerning the same, without any hindrance, interruption, or interference, or claim, or demand whatever of him, his executors, administrators, or assigns, or any other person, or persons, by or with his order, consent, or permission.

An indenture of assurance executed by Georgina Cotton, on the 11th of June, 1867, after reciting the above covenants of the settlement, and that her sister was dead, and she was entitled to a grant of administration with the will annexed of her estate, and that she had an absolute power of disposition over all the property coming to her by the will, and that, being desirous that what was so coming to her should be got in for her by her sons, Adolphus George Finch Cotton and Albert Ellice Pine Cotton, or one of them, and that for these purposes the said letters of administration should be granted to them, or one of them, she had determined with that object to make such an appointment and assignment as was thereinafter contained, went on to appoint, grant, and assign unto her said sons, their executors and administrators, all the property given to her under the said will, and all her estate, right, title, and interest in or to the same, in trust for her absolutely and for her sole and separate use, independently of her present or any future husband.

July 23. *Dr. Deane, Q.C.* (*H. C. Phear* with him), moved for a grant of administration with the will annexed to the sons of Mrs. Cotton, the residuary legatee, as her nominees. No renunciation has been signed by H. P. Cotton, and no notice of this application

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has been given to him. It is submitted, that inasmuch as he has no interest whatever in the estate, he is not entitled to the grant, and therefore no such notice or renunciation is necessary. If there is any doubt as to his right, the grant can be made under the 73rd section of the 20 & 21 Vict. c. 77: *In the Goods of Martindale* (1); *In re Stephenson.* (2)

SIR J. P. WILDE. It was argued in this case that a husband, who by a marriage settlement covenanted that all property coming to his wife during coverture should be applied to her separate use, and that he would not interfere with its application or disposition, and would execute all requisite deeds for that purpose, was not entitled in right of his wife to a grant of administration with the will annexed, of which she was residuary legatee. It is unnecessary to decide that point, because the Court has power to make the grant under the 73rd section, and a case was cited in which such a grant had been made under similar circumstances. I think that in this case the husband has no real substantial interest in the property disposed of by the will. He has so dealt with all the property coming to his wife that the Court of Chancery would undoubtedly hold that it forms part of her separate estate; therefore he has no real practical interest which he could enforce, and I think he may well be passed over.

Administration with the will annexed granted as prayed, under the 73rd section.

Attorneys: *Pyke & Irving.*

(1) 1 Sw. & Tr. 8; 27 L. J. (P. M. & A.) 29.
(2) 3 De G. M. & G. 969.

CONRADI *v.* CONRADI, WORRALL, AND WAY. THE QUEEN'S PROCTOR INTERVENING.

1867
April 30.

Pleading—Demurrer—Answer alleging Adultery of Petitioner—Finding of Adultery against Petitioner in a previous Suit.

Post 579
2 P.D. 76

The Queen's Proctor, intervening in a suit for dissolution of marriage, alleged in his answer, 1 and 2, collusion; 3, that in a previous suit by the petitioner against the respondent, the Court found that the petitioner had committed adultery, and dismissed his petition; 4, adultery of the petitioner; demurrer to the third paragraph of the answer:—

Quære, whether the finding in the previous suit is admissible as evidence of the petitioner's adultery, and, if admissible, whether it is conclusive.

Held, that, whether admissible for that purpose or not, it is a material fact for the consideration of the Court. Demurrer overruled.

THIS was a petition, by George Norris Conradi, for a dissolution of his marriage with Rebecca Conradi, on the ground of her adultery with Edward Worrall and James Way, and claiming 5*l.* damages. The acts of adultery were charged to have been committed in February, 1865, and March and April, 1866. The respondent and the co-respondents did not appear. The Queen's Proctor intervened, and pleaded: 1. That the parties were acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case. 2. That neither the respondent nor either of the co-respondents had filed any answer to the petition. 3. That in October, 1865, the petitioner presented a petition for the dissolution of his marriage with the respondent on the ground of her having committed adultery with one W. C. Flashman, and made the said W. C. Flashman a co-respondent in the suit; that the said W. C. Flashman pleaded, amongst other things, that the petitioner had committed adultery with one Elizabeth Frost; that, upon the trial of the said suit by the Judge Ordinary, it was found and adjudged by him that the petitioner had committed adultery with Elizabeth Frost, and the Judge Ordinary thereupon dismissed the petition. 4. That in the months of March and April, 1865, at Dover, the petitioner, on divers occasions, committed adultery with a sister of the said respondent.

The petitioner filed a replication, taking issue on the allegations contained in the first and fourth paragraphs of the Queen's

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Proctor's answer. As to the third paragraph, he denied the allegations contained in it, and also demurred to it as bad in substance. The grounds of demurrer were, that the petitioner is not, by reason of the alleged judgment, debarred from prosecuting this suit; and further, that the petitioner is not by reason of the said judgment estopped from contending that he has not been guilty of adultery with the said Elizabeth Frost. The Queen's Proctor filed a joinder in demurrer.

Dr. Spinks, Q.C., and *Inderwick*, for the petitioner. It has been held that, although a petitioner has been acquitted of a charge of adultery made by a respondent, the Queen's Proctor intervening after such acquittal may raise the same issue: *Harding* v. *Harding & Lance, the Queen's Proctor intervening* (1); *Masters* v. *Masters, the Queen's Proctor intervening.* (2) The same rule must be applied when the Queen's Proctor sets up a previous decision against a petitioner as an estoppel. It is not enough for the Queen's Proctor to shew that on a former occasion the petitioner was found guilty of adultery; he must produce evidence of that adultery.

The Queen's Advocate (*Hannen* with him), for the Queen's Proctor. The question is, not whether the judgment in the previous suit is an estoppel, but whether it is a material fact of which it is the duty of the Queen's Proctor to inform the Court. Having allowed that judgment to stand without applying for a rehearing, and without appealing, the petitioner cannot be allowed to keep the Court in ignorance of the fact that such a judgment was pronounced.

[THE JUDGE ORDINARY. How can the petitioner demur to one portion of the answer when the rest of it is good? At common law he would, no doubt, be entitled to argue that the plea is no answer to the petition, and ought to be disallowed. But in this court it is not necessary that each separate paragraph of an answer should be a good plea. An answer is taken as a whole. If, however, paragraphs are inserted in the answer which appear to be irrelevant or embarrassing, they may be struck out.]

(1) 4 Sw. & Tr. 145; 34 L. J. (P. M. & A.) 9, 108, 129.
(2) 34 L. J. (P. M. & A.) 7.

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Dr. Spinks in reply. If the judgment in the former suit is conclusive, it will be useless to produce evidence that the petitioner did not commit the adultery charged. The petitioner wishes to take the opinion of the Court upon the sufficiency of that part of the Queen's Proctor's answer, in order to know whether it is competent to him to re-open the question of his adultery notwithstanding the judgment. The statute (1) says that the Court is to be "satisfied on the evidence" as to the facts of the case, and if it acts upon the judgment in a previous suit without requiring evidence of the facts on which that judgment was founded, it will not satisfy itself "on the evidence."

THE JUDGE ORDINARY. The question turns on the construction of the 31st section of the Divorce Act, which invests the Court with a certain sort of discretion (I use that word for want of a better, although it has been found fault with in the House of Lords (2)), as to dissolving or not dissolving a marriage in cases where it finds that the petitioner has committed adultery. Of course, in order to exercise that power, it is necessary that the Court should be made aware of the nature of the adultery which is put forward as a bar to the petitioner's remedy, of the circumstances under which it was committed, and of all other matters connected with the case, which may tend to influence its judgment. It follows that if a paragraph in an answer, alleging merely that the petitioner has been guilty of adultery, were to be treated as a plea at common law, it would be bad on demurrer, as it is not necessarily an answer to the petition. It alleges a fact that may possibly be, but is not necessarily, an answer.

It is worth while to point out one result that would follow from introducing the common law practice into this court. No respondent or co-respondent would be able to allege the petitioner's adultery, because it is not an absolute bar to the suit. The daily practice of the Court is the other way. It is a mistake to suppose that the proceedings in this court are framed on the common law plan. The defendant (*i.e.* the respondent) does not file separate pleas, which are considered independently of each other, and each

(1) 20 & 21 Vict. c. 85, s. 31.

(2) *Latour* v. *Latour*, 10 H. L. C. at p. 698; 33 L. J. (P. M. & A.) at p. 93, per Lord Westbury. 10 Jur. N.S. 325, 326

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of which is an answer to the suit, but files a general statement, called an answer, verified by oath, and which must be looked at as a whole when a question is raised by demurrer as to its sufficiency. The Queen's Proctor, in accordance with the usual practice, has filed his answer, in which, after alleging collusion and the incestuous adultery of the petitioner, he goes on to say that the charge of adultery against the petitioner has already been investigated in this court, and the Court was satisfied that it had been committed. I think the demurrer to that part of the answer cannot be sustained. It is not the whole, but only a portion of the answer; and on that ground alone, there being other parts of the answer which are undoubtedly sufficient, it cannot be held bad on demurrer.

A further reason for allowing the paragraph to stand, is that it alleges a material fact for the consideration of the Court, although it may not be an absolute bar to the suit. The answer is good, both in substance and in form, for the facts which it alleges are not set up as an absolute bar, but as material circumstances for the consideration of the Court.

It is suggested that it would be convenient to take the opinion of the Court upon the question, whether the finding in the former suit is conclusive against the petitioner, at this stage; but the Court cannot take a short cut to the decision of the case in that way. I do not intend to decide by my judgment on this demurrer that the finding of the Court on the evidence of adultery in the previous suit will be conclusive against the petitioner on the trial of this suit. Two questions will arise on the trial, if the finding of the Court in the former suit is tendered—1st, whether it is admissible as evidence of adultery; 2ndly, if admissible, whether it is conclusive.

Judgment for the Queen's Proctor on the demurrer.

Attorneys for petitioner: *Pritchard & Collette.*
Queen's Proctor.

BAYLIS *v.* BAYLIS, TEEVAN, AND COOPER. 1867

Dissolution—20 & 21 *Vict. c.* 85, *s.* 43—*Examination of Petitioner by the Court*—*Opposed Suit*—*Conduct conducing to Adultery.* *June* 25.

In answer to a husband's petition for dissolution of marriage, the wife pleaded that the petitioner had separated from her without reasonable cause, and thereby conduced to her adultery. The Court refused to examine the petitioner under the 43rd section of the 20 & 21 Vict. c. 85, as to the circumstances leading to the separation, having no power to examine the respondent as to these circumstances.

A husband having married a woman of loose character, with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in a place where she would be accessible to temptation, and where she was guilty of adultery. There was no evidence that there was any reasonable cause for the separation. The Court was of opinion that this was conduct conducing to her adultery, and dismissed the petition.

THIS was a petition by a husband for dissolution of marriage. The respondent, in her answer, did not deny the charge of adultery with the co-respondent Cooper, but denied that she had committed adultery with the co-respondent Teevan, and further alleged that the petitioner had separated from her without reasonable cause, and had thereby been guilty of conduct conducing to her adultery. The co-respondent Teevan denied, and the co-respondent Cooper admitted, the adultery charged; and both of them further pleaded that, at the time of the alleged adultery, they were not aware that the respondent was a married woman. The cause came on for trial before the Judge Ordinary without a jury. (June 12.)

Ballantine, Serjt., *Dr. Tristram*, and *Inderwick*, for the petitioner.

Dr. Deane, Q.C., and *Dr. Swabey*, for the respondent.

Dr. Spinks, Q.C., for the co-respondent Cooper.

Edward James, Q.C., and *Searle*, for the co-respondent Teevan.

At the close of the petitioner's case, no evidence being called on behalf of the respondent or the co-respondents,

Ballantine, Serjt., applied to the Court to examine the petitioner under the 43rd section of the 20 & 21 Vict. c. 85, with regard to the circumstances which led to his separating himself from her.

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June 13. THE JUDGE ORDINARY. I have considered the question whether the Court ought to exercise the discretionary power vested in it by the 43rd section of the Divorce Act of examining the petitioner. It is to be observed that the section gives the Court no corresponding power of examining the respondent. It has been the constant practice of the Court in unopposed cases, where circumstances have arisen to require an explanation of the husband's conduct, to put him in the box, and take his examination. The question arises whether in this case the Court can properly and justly exercise its power by so doing, when the other party to the suit, who is opposing the divorce, is by law incapable of being examined. If the Court were asked to examine the petitioner upon matters in respect of which the respondent was not able to give any account, I think that the circumstance of her being incapable of being called as a witness would not necessarily be a ground for excluding his evidence. But, after reading the notes of the evidence in this case, it is plain to my mind that the matter about which the Court would have to make inquiry of the petitioner would be as to the mode in which he and his wife lived together, anterior to her being sent away from his home into lodgings. It is said on the part of the husband that she was guilty of misconduct such as justified the course he took, and that by her violence she inflicted certain injuries on him. This charge was made against her in the husband's presence, and she denied it, and said the injuries were inflicted by a servant. It is clear that this is one of the main matters which the Court would have to inquire about. It may be that her story is true, or it may be that the violence was committed under circumstances which afforded more or less justification for it. Under these circumstances, I think it would be very unjust to take the account of the husband without being able to take the account of the wife. I have therefore determined upon not exercising the discretionary power given to the Court by the 43rd section.

I must take time to deliberate whether I can grant the relief prayed for upon the evidence as it now stands.

June 25. THE JUDGE ORDINARY. In this case a young man married a woman of loose character, with whom he had lived for

nine months previously. After a short time they disagreed about money. He accused her of extravagance, and she him of parsimony. At last he broke up the house, sold his furniture, and told his wife she must go and live by herself in the chambers he had occupied when a bachelor, in Regent Street. As soon as she went there he set a watch over her, and was successful, in a very short time, in detecting her in adultery. In truth, she made little concealment of it, saying she must have a protector, and would not live alone. The result is this suit. But the Court cannot grant the petitioner a divorce.

It has been sometimes supposed that if a man chooses to marry an immodest woman, he cannot afterwards free himself from her by reason of her unchastity. But there is no such law. Whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and if she break the conditions of marriage, her husband is entitled to claim its dissolution. But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home, and his society, and is certainly not the less so in cases where the previous life of his wife renders her peculiarly accessible to temptation. No man is justified in turning his wife from his house without reasonable cause, and then claiming a divorce on account of the misconduct to which he has by so doing conduced. And this I am of opinion the petitioner did.

The reasonable cause he alleges is her violence. But there was at the trial no proof of it. The only witness on that head was a man whom he had hired from a private inquiry office to come and live with him and his wife under the disguise of being his friend. He was there a week, and spoke to her violence of manner, but proved no personal violence to the petitioner; and yet he sent his wife away from him, and, much against her will, removed her, without friend or society, to a place in which of all others she would be accessible to temptation, and further, though she had given him no reason to suspect her of infidelity, immediately set a watch upon her actions.

It is hardly to be doubted that he both expected and hoped that she might commit herself. What is this but, in the words of the statute, "conduct conducing to the adultery"? The petition must be dismissed.

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BAYLIS v. BAYLIS.

The Court made the usual order for the payment of the respondent's costs by the petitioner, but refused to order him to pay the costs of either of the co-respondents.

Proctor for petitioner: *G. R. Longden.*
Attorney for respondent: *W. S. Page.*
Attorneys for co-respondent Teevan: *Vallance & Vallance.*
Attorneys for co-respondent Cooper: *Kimber & Ellis.*

Aug. 6.

SMITH AND OTHERS *v.* TEBBITT AND OTHERS.

Testamentary Capacity.

If disease be once shewn to exist in the mind of a testator, it matters not that it is discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, or that the subject on which it is manifested has no connection whatever with the testamentary disposition before the Court, the testator must be pronounced incapable.

A diseased state of mind once proved to have established itself will be presumed to continue, and the burthen of shewing that health has been restored falls upon those who assert it.

The tests of mental disease considered.

The question of insanity is a mixed one, partly within the range of common observation, and partly within the range of special medical experience, and it is the office of the Court, in searching for a conclusion, to inform itself of the general results of medical observation, and to make a comparison between the sayings and doings of the testator at the time when the disease is alleged to exist; and, first, his sayings and doings at a time when he was sane, or the sayings and doings of those sane persons whose general temperament and character bear the closest resemblance to his own; and, secondly, the sayings and doings of insane persons.

ANN THWAYTES, late of Charman Dean, near Worthing, in Sussex, and of 17, Hyde Park Gardens, in Middlesex, widow, died on the 8th of April, 1866, leaving a will, dated the 2nd of March, 1866, whereof she appointed the plaintiffs, John Simms Smith, the elder, Samuel Smith, Richard Edwards, Robert Arthur Brennan, and John Simms Smith, the younger, executors. The defendant, Mrs. Sarah Tebbitt, having entered a caveat and an appearance, as the natural and lawful sister and only next of kin of the deceased, the plaintiffs put her upon proof of her interest, which she propounded and established. (1) The plaintiffs thereupon propounded the will of the 2nd March, 1866. The defendant, Mrs.

(1) Law Rep. 1 P. & M. 354.

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SMITH v. TEBBITT.

Tebbitt, pleaded—1, that it was not duly executed; 2, that the deceased was not of sound mind, memory, and understanding at the time of its alleged execution; 3, that it was procured by the undue influence of John Simms Smith, the elder, and of Samuel Smith, and of others acting with them. The other defendants, Mr. Walter Tebbitt and Mrs. Cook, two of the children of Mrs. Tebbitt, intervened in the suit as legatees under a former will, and pleaded the same pleas as Mrs. Tebbitt. The cause came on for trial before Sir J. P. Wilde, without a jury, on the 26th of April, and the evidence and the arguments occupied the Court on the 27th of April, the 1st, 2nd, 3rd, 4th, 8th, 9th, and 10th of May.

Sir R. Palmer, Q.C., Ballantine, Serjt., Dr. Spinks, Q.C., and *Dr. Swabey,* for the executors.

The Queen's Advocate (*Sir R. Phillimore*), *Edward James, Q.C.,* and *Dr. Tristram,* for Mrs. Tebbitt.

The Solicitor-General (*Sir J. B. Karslake*), *Coleridge, Q.C.,* and *Searle,* for Mr. Walter Tebbitt and Mrs. Cook.

The facts of the case, and the substance of the evidence on which the question of the validity of the will turned, are fully set out in the judgment. It is only necessary to state, that the deceased was a widow, her husband having died in 1834, leaving her a fortune of about 500,000*l.*; that she had made several wills and codicils since her husband's death, in all of which the family of the Smiths (more especially Dr. Simms Smith) were the parties principally benefited. By the will now propounded she left legacies amounting in the whole to 45,000*l.* to the family of her husband, Mr. Thwaytes; legacies to the amount of 45,000*l.* to the family of her sister, Mrs. Tebbitt; legacies to a considerable amount to different persons with whom she had been acquainted during the latter part of her life, to her servants, and to charities; and the residue to John Simms Smith, the elder, and to Samuel Smith. In addition to his share of the residue, a legacy of 30,000*l.* was given to Samuel Smith, and the estate of Charman Dean was devised to him for life, and then to his two daughters.

In the course of the argument the following cases were cited:—*Waring* v. *Waring* (1); *Thornton* v. *Howe* (2); *Symes* v. *Green* (3);

(1) 6 Moo. P. C. 341. (2) 31 Beav. 14. (3) 1 Sw. & Tr. 401.

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Nottidge v. *Prince* (1); *Dew* v. *Clark* (2); *Wood's Case* (3); *Prinsep* v. *Dyce Sombre* (4).

Cur. adv. vult.

August 6th. SIR J. P. WILDE delivered judgment as follows:—

It is not uncommon, in speaking of cases like the present, to say that the question to be solved is, whether the testatrix was "mad." But the question raised by the pleadings is, whether the testatrix was of "sound and disposing mind, memory, and understanding" at the time she made her will, and the legal meaning of these terms is a definite and limited one, having no relation to any other subject than that of testamentary capacity. They have received judicial exposition in terms sufficiently clear and at the hands of authority sufficiently high. I forbear, therefore, to discuss "madness," either in its popular acceptation or its legal aspect in relation to other matters, such as immunity in the commission of crime, discharge from the obligation of contract, restraint in the management of property, or the liberty of self-control. The principle of decision in such matters may be or may not be (certainly has not always been in criminal matters) identical with that which governs the law relating to wills. An inquiry into the differences which the decided cases may present under these various heads would lack neither extent nor interest. But it has no place here. The law testamentary has been laid down by my predecessors independently of all such considerations, and it is the simple duty of the Court to ascertain and administer it.

There is no country in the world in which the law permits a larger exercise of volition in the disposal of property after death than in England. But it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness or tainted by morbid influence. Such a mind the law calls a "sound and disposing mind." The inquiry now before the Court has relation only to the last of those conditions; and the subject is again narrowed by the nature of the morbid influence or mental disorder imputed: for it is not of an obvious and general perversion of the mind from reason, nor of

(1) 2 Giff. 246. (3) 27 State Trials, at p. 1315.
(2) Reported by Dr. Haggard. (4) 10 Moo. P. C. 232.

language or conduct generally irrational, that the testatrix is here accused; but only of that peculiar form of mental malady which used to be called partial insanity, and which, in the more exact language of modern science, has obtained the name of monomania. A person who is affected by monomania, although sensible or prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will. This has been clearly decided in the several cases quoted at the bar, of which it is only necessary to name that of *Waring* v. *Waring*. (1) It is needless to travel over the paths by which this conclusion has been reached. It is properly the starting point in such an inquiry as the present. For I conceive the decided cases to have established this proposition: that, if disease be once shewn to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Further, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court.

Thus far all is clear, but beyond it I search the decided cases in vain for a guide. What is to be the proof of disease? What is to be the test, if there be a test, of morbid mental action? The existence of mental "delusions," it would perhaps be answered. But this only postpones the question in place of answering it. For what is a mental "delusion?" How is it to be defined so as to constitute a test, universally applicable, of mental disorder or disease? The word is not a very fortunate one. In common parlance, a man may be said to be under a "delusion," when he only labours under a mistake. The "delusion" intended is, of course, something very different. To say that a "morbid" or an "insane delusion" is meant, is to beg the question, for the "delusion" to be sought is to be the test of insanity; and to say that an insane or morbid delusion is the test of insanity or disease, does not advance the inquiry. "A belief of facts which no rational person would have believed," says Sir John Nicoll. (2) "No *rational* person." This, too, appears open to a like objection, for what are the limits

(1) 6 Moo. P. C. 341. (2) In *Dew* v. *Clark*, reported by Dr. Haggard, at p. 7.

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of a rational man's belief? And to say that a belief exceeds them, is only to say that it is irrational or insane. "The belief of things as realities which exist only in the imagination of the patient," says Lord Brougham, in *Waring* v. *Waring*. (1) But surely, sane people often imagine things to exist which have no existence in reality, both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams?

I turn to another definition. It is by Dr. Willis, a man of great eminence, and is quoted by Sir John Nicoll in *Dew* v. *Clark*. "A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity." This seems to offer a surer ground: but then the "evidence" of the falsity is to be "plain," and who shall say if it be so or not? In many or most cases it would be easy enough. Those who have entertained the "delusive idea" that their bodies were made of glass, or their legs of butter (as it may be found in medical works that some have done), certainly have "plain evidence" at hand—the evidence of their senses—of its falsity. But what if the "delusive idea" concern a subject in which the senses play no part, and the "plain evidence" by which it is to be discharged is matter of reasoning, and addressed to the intellectual faculty? Will all sane men agree whether the evidence is plain or not? And, if not, shall one man in all cases pronounce another a monomaniac when the evidence is plain, to his reason, of the falsity of the other's ideas?

I find no fault with the language of these definitions as fairly and properly describing the mental phenomena they are used to depict. I only assert that the existence of mental delusions thus defined is not capable of being erected into an universal test of mental disease.

It is, no doubt, true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may therefore be properly called "delusive." But what I mean to convey on this head is this, that the question of insanity and the question of "delusions" is really one and the same—that the *only* delusions which prove insanity are insane delusions — and that the broad inquiry into mental health or disease cannot, in all cases, be either narrowed or determined

(1) 6 Moo. P. C. at p. 354.

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by any previous or substituted inquiry into the existence of what are called "delusions."

I say in all cases, for in some such as those to which I have already alluded, where the delusive idea ought to receive its condemnation and expulsion at once from the simple action of the senses, the contrary is the case; and the same may be said of delusions obviously opposed to the simple ordinary and universal action of reason in healthy minds. These are the simple cases, about which no one would doubt, and in them the proof of the "delusions" is also the proof of insanity without more.

But what is to be said of the more complicated cases? What if the diseased action of the mind does not exhibit itself on the surface, as it were, opposing its hallucinations to the common senses or reason of all mankind, but can be tracked only in the recesses of abstract thought or religious speculation—regions in which the mental action of the sane produces no common result—and all is question and conflict? In what form of words could a "delusion" be defined, which would be a positive test of insanity, in such cases as these?

In none, I conceive, but "*insane delusions*," or words of the like import, which carry with them the whole breadth of the general inquiry.

How, then, is this question of insanity to be approached by a legal tribunal? What tests are to be applied for disease? What limits assigned within which extravagance of thought is to be pronounced compatible with mental health.

The decided cases offer no light on these heads. I nowhere find any attempt to devise such tests or assign such limits. Nor do I conceive that any tests, however elaborate, beyond the common and ordinary method of judging in such matters, would be competent to bear the strain of individual cases in the course of experience.

It is perhaps worth while, then, to step aside for a moment to inquire what that common and ordinary method of judging is, and upon what it is founded.

No man knows aught of the condition of another's mind, except by comparison with his own. And in instituting this comparison we recognize the general fact that all mankind are endowed with

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the same senses, moved by the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individual at different times. But they vary within certain limits, and certain limits only. It is when the words or deeds of others, referred to our own standard and that which by experience is found to be the common standard of the human race, appear to transgress those limits, that we suspect these common senses, emotions, and faculties, which we know to exist, to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself either on many subjects or with uniform constancy, in the behaviour of the individual, we pronounce disease without hesitation. In proportion as the divergence is either casual or trifling, or open to some other probable solution, the inquiry is difficult, and the judgment hesitates. Here, then, I think, is the simple rule by which mankind in general pronounce upon mental disease. But to those who have studied the subject of insanity another and alternative method is open.

There may be, and no doubt are, many whose insanity is suspected but not proved; but in the large majority of the insane, mental disease admits of no doubt whatever. Their ideas, their conduct and demeanour, contrast at almost every point of comparison with those of their fellow men. And it is the especial business of those who devote themselves to the mitigation or cure of this fearful malady, to study the ways and forms of thought and expression which attend upon it; the sort of things that the insane say and do; their bearing and demeanour; the occasions they choose or decline for the exhibition of their ruling ideas. All these become familiar to the medical attendant. Hence he is furnished with another road by which to approach the determination of insanity in a doubtful case. He can reason from the certainly to the probably diseased mind, and is enabled to trace in the latter, lineaments which are clearly marked in the former. Thus, while the world at large can only contrast the doubtful case with the sane, the physician has at hand the alternative contrast with the insane. It is a consequence of these alternative methods of judgment that the question of insanity, though it falls to the lot of a legal tribunal, is properly a mixed one—partly within the

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range of common observation, and in so far fit to be considered by a jury; partly within the range of special experience, and in so far the proper subject of medical inquiry. It is the office of the Court, then, to inform itself, as far as opportunity permits, of the general results of medical observation, and to approach the subject of this case on the two opposite sides thus indicated—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the deceased.

What these sayings and doings were appears from the following extracts from the defendant's evidence:

Mrs. Sarah Tebbitt: She said she "had intercourse with the Creator. I talked to him as I would to you—question and answer, question and answer—and He tells me I am permitted to tell you that this child is born for the devil." She called herself "the third person in the Trinity. She was the Holy Ghost, and Mr. Simms Smith was the Father." She said, "She had much intercourse with the Creator; that He knew everything she was doing; He could not do without her. She was above God seven degrees." Sometimes "she had had a bad night; she had been sending the cholera, or sending the influenza, or sending something through all creation, and of course it had to go through her first." One day she said, "I wonder you see me alive; the brutes have been attempting to poison me." She came and stayed three weeks with me, "to get away from those brutes that were attempting to poison her." Then she said, "We were attempting her life, for she saw the arsenic swimming on the tar-water." She said, "She was blind for ten weeks, and that she used to sit with her face to the wall, hemming some coarse work." "That one stage of her work was blindness." She said, "You little know this is one stage of my work. I have gone through the new birth; every bone and sinew and drop of blood has been made new." On one occasion she said, "She was sorry I had come up; I disturbed her." I said, "You seem to be alone." She said, "No; I am not alone." I said, "I do not see anybody with you; you seem to be alone." She said, "I am not alone, I have a room full of company. You do not see them, but I do. My poor mother is with me, and Dr. Babington" (who was dead) "is with me." She said they were there, "sitting at the table." She used to tell me "that

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the Almighty said if He lost her, everything would go into chaos." She came and asked me to go with her to purchase some baby-linen, "as she should bring forth the Saviour of the world." When I spoke to her about mourning for her husband, she said, "Mourning! go into mourning for the devil!" She called her husband the devil. When I saw her again I said, "Well, you have got your mourning?" She said, "Yes; I am obliged to appear in nature, or else people would say I am mad." Looking for a house in London, she said, "She must do it, but she should not want it for long, for at the end of five years she would have Buckingham Palace and Windsor Castle." Speaking of the Bible, I told her I thought it was written by the inspiration of God, for our edification. She said I "was as great a fool as others she had talked to."

Robert Tebbitt Abbott: Visited her in 1835. She drew a chair towards me, and said, "Bob, do you know that I am the Holy Ghost?" I said, "What, Mrs. Thwaytes?" She said, "I am the third person of the Trinity, and Dr. Smith is one of us. I have power over the whole creation. It is through me that cholera came. The Father said to me, 'My dear, turn on the screw,' and the cholera came. After that He said, 'Turn it again,' and it disappeared. The Tebbitt family, I am sorry to say, are all doomed to everlasting perdition, especially Robert." She said, "I was shut up three days and three nights in a dark room, and I held there communication with the Father." I said, "What nonsense, Mrs. Thwaytes!" She said, "It is not nonsense, but you are not in a fit state to hear anything further on the matter."

Thomas Clarke (formerly in the employment of Gillows, Oxford Street): Went to see her. She gave him a memorandum settling 50*l.* a year upon him. She then said, "She was part and parcel of the Holy Ghost; that Dr. Smith was also connected with her in the Trinity, and that she held direct communication with the Father; that whenever she had any question to ask, the answer came back from heaven in the shortest possible period; as soon as the question was put she got the answer." Upon one occasion she said, "She was the Bride of Christ." Seeing me look surprised, she said, "You seem surprised at my saying this, because I am a married woman, but I am a pure virgin." On one occasion she said she had been buying a scholarship or presentation to St. Ann's

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School, and that the governors little knew what they had been about—what a good bargain she had made, for she could never die. The presentation would last for eternity, as long as the world was. She told me, "The drawing-rooms were furnished for the express purpose of our Saviour on His second coming on the earth to judge the world, to dwell in, and that was the reason she had gone to so great an expense." She told me, "Dr. Smith knew everything she did." After she gave me that paper, she told me that "Dr. Smith knew of it, and that he knew every transaction that she carried through." "The doctor knows everything I do; I do nothing without consulting him."

Mrs. Sarah Ann Cooke: Very often said her "husband was the king of the devils. That she has drawn him through the moon by his own gross electricity, and through the dark volcanoes of the earth, and that now he reigns king of the devils." She told me "the doctor was God the Father; that Fisher was God the Son; and that she was God the Holy Ghost. They could do nothing apart or without the knowledge of each other." At Purcaster she said, "Now you are old enough to embrace the supernatural—I have brought your mother into the work long ago, but it is cut off from her, and she cannot repeat it to you." Often said, "She was the pivot on which the whole world hung. She was the first great cause, and that the Creator often said, 'Without you, my dear, everything must go back into chaos.'" Always said, "I am above God—God can do nothing without me." Said, on one occasion, "that she had had a new feature in the work; that they had been bringing a fourth into the Trinity." Often told me that "at one stage of the work the doctor required large sums of money to carry on the work." She never mentioned any particular sum but once. I cannot remember now whether it was 3000*l.* or 4000*l.*, a balance at her bankers, and she said "O, doctor, you had better have it; you are always wanting money for the work." Often said, "Well, I have been asking the doctor how our work is going on, and sometimes he made answer, 'Well, I think it will soon be done.' At another time he would say 'We must have patience.'" She told me that "he knew everything she did, because he was a part of the Trinity." "They could do nothing apart or without the knowledge of each

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other." In Finsbury Circus she said, "I have been advised by my friends to shut the door against you all." Concerning her will, she said, "it seemed very foolish for her to make a will, but she must act in nature." Going for a drive on one occasion, she said, "I have been obliged to have Hyde in the carriage. He stopped me at Broadwater Church to ask me something about putting my name and Mr. Thwaytes' on the window, and the Creator said, 'My dear, you must broach the supernatural to Hyde —we cannot have God and the devil on the same window in the church.'" Often said, "I am never allowed to pen the supernatural." At Hyde Park Gardens (in 1851), about a month before my baby was born, she said, "Come up, child, I have something to give you"—and she took out of a drawer a heap of clothes, and said, "Your mother went with me to buy these clothes when I was about to bring forth a Saviour. Now, to no other person would I give these clothes, but to you, for your baby." At Broadwater, in January, 1857, she said, "You had better go to Manchester altogether." I tried to make some explanation, and hoped that she was not offended about anything, and she said "*I am not allowed to be troubled with any of your explanations.*" I was very weak and ill at the time, and really said no more about it, but left. Often said that Mrs. Curtis was quite alive to the work—that she had given her discussions, "the same as I do you, child." Once I asked her "Have you slept well?" and she said, "No, child, I have not, for we have been all night sending the cholera out amongst the creatures. It is obliged to go through my body." On another occasion, "We have been sending out the influenza amongst the creatures." In speaking of the cholera, she would say, "They will be dropping about like rotten sheep." Conversation rational upon other subjects than religion. She would "turn the machinery back to nature," and then she would talk of anything else. If she heard Mr. Samuel Smith coming, she would "turn the machinery back to nature." Often, when giving me discussions, she has heard Mr. Samuel Smith, and she has said, "Now, child, I must turn your machinery back to nature."

Louisa Little, companion to Mrs. Thwaytes from March, 1836, to January, 1839: She spoke of "a spiritual work that she was carrying on, and that she intended to bring the world up for

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judgment." "The clergy must be brought up first; that they intended to take the lives of all the people, and that they could not have bad persons in heaven." She had a dress made, and a head-dress of hair and a coronal of diamonds "expressly for the judgment day." She said, "Mrs. Curtis was a child of God." She made her a present of a handsome set of jewels, and said, "She was obliged to fall down on her knees and worship her, for she knew she was the Holy Ghost." She said, "Christ would be crucified upon twelve earths, and that he would be born. She shewed me a drawer where the clothes (baby-linen) were covered over, and said I should see them some day; and that the Saviour would be born; that she should have a child, and that it would be a little girl." Looking out of the window, as the people went to church, she said, "I do not wonder at people looking at me: they little think who I am. I am the Holy Ghost; but they do not know who I am." She said, "It was no use her going to church; she could not pray to herself." She said, "Dr. Smith was part of the Trinity; that he was God the Father, and that he knew all she thought, and all she did." Once, after a visit, she said, "I am not to give you any more presents. Simms says I am not to do it; and if he were in Jamaica, and I sitting here by the fireside, he would know all that I thought, and all that I did." Simms was the doctor. Frequently said that "Sol was pouring his rays into her brain." One morning, early in 1837, I was rung up at two o'clock. Went down: thought she was ill. She said, "Come into bed, girl. Lie down; I am having the Spirit poured into me. It is the judgment. We are crowning the heavens." I went to sleep. In the morning, she said, "You have slept through it," and she told me she "had heard most beautiful music; that she had seen Simms, and Fisher, and many others; that it was a preparation for the judgment." Driving through the park, she said, "The Queen little thinks who I am. When the work is finished, we shall have Buckingham Palace and Windsor Castle; but God says we must have patience, my dear." On her return from Canterbury Cathedral, on one occasion, she said, "The man little thought who she was." Speaking of Mr. Sam Smith, she said, "She had been permitted to give him spiritual discussion one evening at écarté, and several times besides; that one evening he was obliged

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to hold his hands before his face, and she was afraid he would fall down dead at her feet." When he had gone, she called me into the room to have my supper, "as I was not permitted to be present." She told me Mrs. Curtis was a "child of God." She bought her a set of jewels, and gave them to her in my presence. I went out of the room and returned. She was then rising from the ground. Mrs. Thwaytes said afterwards, that "Mary had fallen down on her knees to her; that she was obliged to worship her; the Creator made her worship her; that the Creator had made her fall down on her knees." She said, "That in Mr. Thwaytes' time, at the commencement of the work, the devil stood up behind the carriage; that a machine was placed at the top, and they took the people's lives as they passed along." She would say, "Don't speak to me—don't speak to me. I am swelling as big as a mountain. I am full of stabs." She said, "She had had a nervous fever, and that she was blind eight or ten weeks; that she hemmed a dozen dusters during the time, and that God put the needle in on one side, and the devil pulled it out on the other: that she could not see herself." She said Mr. Samuel Smith "being the doctor's brother, she was obliged to admit him. That if he had not been, she would have shut the door against him. She did not at all times approve of his behaviour to her." After the doctor had visited her, she would say, "They had touched on the spiritual; that the doctor was God the Father, and knew all that she did and thought."

Samuel Vine: Formerly footman in Mrs. Thwaytes' service from 1838 (about) to 1845. She said, "As I got older, she got younger; and she would be to the end of the world. She and Doctor Smith—they were the Superior Beings." "That she and the doctor made all the thunder and lightning, and they were in their glory in a good thunderstorm." "That they were the Supreme Beings." "That they communicated together, though they were absent from one another; that they used to communicate as well in their absence."

Walter Gardiner: Formerly butler to Mrs. Thwaytes, from April, 1860, to April, 1862. One Sunday evening she told me "she had been brought into a great work; that God had specially communicated to her that she was to be His child. That God was

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her father; and that she was brought into the work in connection with Dr. Smith, and that they were to carry out the purposes of God; that they together formed the Trinity; and that from the time that God had communicated this to her she had been in direct communication with him. That she, being in her bed at the time God was communicating with her, being in a great perspiration, God himself visibly wiped the perspiration off her face." Asked her to go and hear the Reverend Mr. Power. She said, "Gardiner, I never go to church. From the time that God began the work with me, I have always had God present with me." She said, "I dare say people wonder, you know, Gardiner, why I do not go to church; but they do not know who I am. They do not know that I am immortal. They do not know that I am part of the Trinity. They do not know that I am equal with God." The doctor visited her once a fortnight. She said that "they always managed all their affairs when he came down, and that that was the express time when the work was carried on." She said she made a will "for the satisfaction of others. I am immortal, and I make a will for the satisfaction of others." She said "that she was to take part in the judgment with the Lord Jesus Christ, in connection with Dr. Smith." That "the judgment would take place in her drawing-room." Speaking of her sister, Mrs. Tebbitt, she said "she was a wretch; that she was a child of the devil; that the Father had told her to cut her off. That she" (Mrs. Tebbitt) "was to have the hottest place in hell." That "her Father had told her so." She said "the judgment would take place in her drawing-room; that the doctor would sit with her in her parlour." That "the carpet and curtains and things in the drawing-room were all ready, when she received a notice from her Father, to be put down in a moment." Repeatedly spoke "about her sister's conduct to her. It was always in connection with the great work; that her Father had told her to cut her off; and that she was a wretch, and must be given up entirely to the devil; and that she was a child of the devil from the beginning."

Egbert Mitchell: In Mrs. Thwaytes' service from January, 1860, until June, 1862; and from December, 1863, or January, 1864, until November, 1864. During the second period, speaking of the death of a Mrs. Wood, she said, "It was a good thing, it was a

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blessed thing for her she could die; but as for her (Mrs. Thwaytes) she could not die." "I cannot die, you know, Mitchell." She spoke of having "to judge the world with Christ; that she was a person in the Trinity; and that Dr. Smith would help her to judge the world; and that he was a person also in the Trinity. Told me it would take place in her house in Hyde Park Gardens." Speaking of a person who was ill of the cholera, she said, "That reminded her of the time when she introduced the cholera; that the cholera was introduced through her." Said "Dr. Smith knew all about what she did, and that he knew whatever she thought." Have heard the subject sometimes spoken of at the dinner-table and tea-table, and Mrs. Curtis has been present.

Mrs. Esther Purkis: Worked for Mrs. Thwaytes as needlewoman about the year 1841. There was a tiara came home, and this tiara was put on by Mrs. Thwaytes, who walked up and down the room. She said, "What do you think of this?" I said, "It is very handsome, indeed, ma'am. Are you going to have your likeness taken in it?" She said, "The idea of such a thing! This is made for me to go to heaven in; but you will understand I am going to live for a thousand years." At Hyde Park one day she said, "I hope you are taking care of my furniture." I said, "Yes, ma'am. I think it's a great pity you don't have it put up when you come to town." She said, "Do not trouble yourself about that. It is for a state occasion, and when that time comes it will be put up; but that will not be in your time."

Fanny Alger: In Mrs. Thwaytes' service from about 1839 for about sixteen years. One morning she said, "I am now gone back to one and twenty, and my teeth are come out now quite fresh, as they were when a child." About the house in Hyde Park she said, "She had the drawing-room fitted up for her and the doctor to sit in judgment." She said, "She never could die, but that she might be killed. She was one of the supernatural." Sometimes she would say she was the Holy Ghost, and at other times that she was the Virgin Mary. She said the doctor and she had been in a great work. That he (Dr. Smith) was one with her, and that he could not do anything without her;—in fact, whatever she did or said he was aware of, whether he was with her or not.

Mrs. Charlotte Sampson: In Mrs. Thwaytes' service from the autumn of 1851 till the beginning of 1856. On one occasion introduced the subject of death to deceased. She was fit to fly through me—and said, "Me die! I shall never die. I shall live a thousand years, and then I shall sit beside of my Father and judge the world, and I shall know then who has done me right and wrong." Also said that "she and Dr. Smith and Mr. Fisher was three in one; and that whatever was transacted in this world went through her body first—a sort of electrified."

Elizabeth Coulson: Housekeeper from June, 1854, to June, 1861. Used to sit with Mrs. Thwaytes of an evening. She told me she was not in nature, but in the spiritual. She said, she stood in the place of the Spirit in the Trinity. She held conversations with the Almighty; question and answer constantly repeated. She asked questions and they were answered. She sometimes called him "the Creator," sometimes "the Father." She spoke of the world coming to an end; she said she could not die, if she did, all creation must cease. She stood in the place of the Spirit, and that the Almighty could not do without her. The Father called her "my dear." She said, if she could not die, she could go into the supine for a length of time. She said, in the year the cholera first visited England, she had a nervous fever, and during that time she was blind for six months. During that time she did a great deal of work, made a large number of dusters and glass-cloths, and her servant used to sit beside her and thread her needles. During that time, she said, "she entered into the new birth—was created anew—flesh and bones, and blood." Told me, "the drawing-room was prepared for a great event, the coming of the Almighty upon earth, to judgment." Shewed me a cushion and a cover, which she said she had made for that occasion. She said, "I should not shew you this only I know you to be rightly constituted." That was a favourite term. She said "Dr. Smith was in the Trinity with her; that they spoke and understood each other, however far apart." Told me "she had taken Mr. Samuel Smith to live with her as her secretary, and she had given him 400*l.* a year; but that he wrote very few letters for her." She was always finding fault with him, and saying "he was one of the devil-head." Once attempted to reason with her, and said, "We must all die." She said, "You

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may; but I see you are not in a right frame of mind; you had better go and take a walk." Spoke of Mrs. Tebbitt, as being one of the devil-head. Said she had had a quarrel with her some years before, respecting one of her sons, to whom she offered a cadetship, and was refused; the mother taking the part of the son, and saying, "If you wish to speak to him, there he is, and he can answer for himself, whether he wishes to be transported." That was the cause of the difference. She said, that Mr. Lane "always came to see her on the day, or near the day that she came into the new birth, and that she once gave him a spiritual lecture for an hour and a half, and he said he never heard anything so edifying in his life. That Mr. Lane always kept the anniversary of the day on which she came into the new birth, sacred." Said "something about her cheques being preserved, as they would be of very great value at a future time." Told me, "that in the lifetime of Mr. Thwaytes, Mr. Thwaytes and her sister had attempted to poison her by putting poison into her food. That she took it to be analyzed at Apothecaries Hall. That she found it was poisoned, and she left Mr. Thwaytes, and went away for a time; but he found her out and brought her back again." Spoke of Mrs. Cooke, and of receiving her again; but one day, she said "the Almighty had told her she must never open her doors to her again." Said, "there was no occasion for her to make a will; because when she died all creation would cease, and her will would be of no use; but that people had told her she must make a will, because she was in the world."

William Barnard: Butler to Mrs. Thwaytes, from April, 1862, to January, 1864. One morning, went in with her luncheon as usual; she was very gloomy. Asked her how she was? She said "she had had a great deal of work to do, she had been working the planets with Dr. Smith, and it had upset her." She entered into the question of the supernatural; that she and the doctor were the Trinity, and without the sanction of either party, neither could do anything. She said "she should not die; but, when she ceased, the world must come to an end. Had had her drawing-room in Hyde Park Gardens prepared for a very great event, which would not take place in my time. When she should judge the world; and those should have their reward who had

done her good, and, those who had done her ill should have their desert." She said, "There's that wretch Cordy—she tried to poison me."

Henry Richard Goodyear: Footman in Mrs. Thwaytes' service from November, 1862, to March, 1864. After taking away the tea-things one night, returned to the room by her order. She had a peach standing on the side table. Said, "This is not one of the ordinary peaches, boy; this is one of the peaches that come out of the garden of heaven. You can take it away, and take it very carefully. You never saw a peach like that before, and you will never see another like it." She said, "that dish of peaches had come from the garden of heaven." She said "she was one of the Supreme Beings, and she had a good deal of power in her hands." She spoke about being one of the Trinity.

The first question that arises on this evidence is one of credibility. Are these extraordinary statements to be taken as true? Considerable exception was taken to the evidence of Mrs. Cooke. She was a niece of Mrs. Thwaytes, and for many months was a visitor at her house. She occupied herself during this time in keeping notes in a diary of all the extravagant things her aunt said to her; and she did not deny that this diary was designed as a proof in future days of her aunt's incapacity to make a will. This diary was given in evidence, and records conversations with Mrs. Thwaytes still more remarkable than any here quoted.

Such a document, if the honesty of its purpose could be relied upon, would form the best evidence in the case. But if there should have been an intention, as unquestionably there was a strong motive, to deceive, it would be the worst. I think it safer to set this portion of the evidence, for the present, aside, and recur to it, if need be, hereafter.

The evidence which remains is, I believe, without exception given by witnesses who have no interests to subserve in this controversy. They are, for the most part, tradesmen or servants with whom Mrs. Thwaytes came in contact, and they reproduce in such various forms the same ideas and thoughts, in their account of the testatrix, as to negative fraudulent concert, and induce a general belief. Nor was the credibility of these witnesses otherwise as-

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sailed by the plaintiffs than by the following argument, on which great stress was laid.

How is it possible, it was asked, to conclude that Mrs. Thwaytes really thought herself to be a member of the Holy Trinity, when you find the witnesses professing to recount such inconsistent statements on the subject? One will have it that she spoke of the Trinity as consisting of one set of persons, and another of a different set, while a third goes so far as to state that she spoke of introducing a fourth person into it. So, again, one witness makes her say that she is the Bride of Christ, another that she is to bring forth the Saviour, another that the child is to be a girl, and so forth. Can ideas and language so different be believed to have come from the same person? Or, if they did—and here great stress was laid—can the Court draw from statements so antagonistic the conclusion that Mrs. Thwaytes entertained any such definite belief as that she was a person of the Holy Trinity, or the mother of the Saviour, or the like?

The answer to this method of reasoning appears to me to lie very near the surface. Assume Mrs. Thwaytes to be a rational person, of sound mind, and it is irrefragable; assume the contrary, and its force vanishes to nothing. If consistency is the offspring of reason, the irrational can scarcely fail to be inconsistent. And when the inconsistencies of thought and speech in an individual are brought forward to establish her want of reason, it is no answer to say that they are such that no rational person could have conceived or uttered them.

I would here observe, before commenting on the extravagant ideas involved in these statements, that the witnesses cover, in the periods to which they allude, a space of upwards of thirty years. Their evidence extends from a time anterior to the death of Mr. Thwaytes into the autumn of the year 1864. Moreover, the witnesses do not profess to repeat the exact and actual words which Mrs. Thwaytes may have used, but only the substance of what she said—asserting, however, that she would say these same things repeatedly and constantly, whenever occasion offered.

I think it fair, therefore, to infer, on the one hand, that the broad ideas involved in what is said to have fallen from her had permanent, if not constant possession of her mind,—while, on the

other, the exact shape of these ideas ought not to be inferred, with too rigid a precision, from the words which the witnesses recount.

With these qualifications, I proceed to address myself to Mrs. Thwaytes' ideas on religious subjects. It is here that it is contended she exhibited the most prominent signs of monomania. They are as follows:

That she had constant and direct communication with God.

That she was the Holy Ghost, and that Dr. Smith was the Father.

That, with some other persons, not always the same, they constituted the Holy Trinity.

That this relation between them was such that Dr. Smith knew all that she thought and did. "If he were in Jamaica, and I sitting here by the fire, he would know all I thought and did."

At another time, that she was "above God seven degrees."

That epidemic diseases, such as cholera and influenza, came through her agency. "God said, 'Turn on the screw,' and the cholera came, 'Turn it again,' and it ceased."

That she was engaged with Dr. Smith in something that she called "the great work." That the first stage of this work had its commencement about the year 1832, when she had an illness in which Dr. Smith attended her. That at this time she suffered much agony, and became blind. That this blindness continued for several weeks (she did not always adhere to the exact number), but that during its continuance she worked with her needle, and hemmed a number of dusters. That at this period she was physically born anew—with new body, bones, nerves, and blood. She repeatedly referred to this, and always as a distinct renewal of her actual body and flesh.

That she was about to give birth to the Saviour, for which event she provided baby-linen.

That, at another time, she was the Bride of Christ, and, at another time, that she was the Virgin Mary.

Lastly, that the great final judgment of man would take place in her own drawing-room, and that she would sit there in judgment on her fellow-creatures, with the Creator.

The exhibition of these leading ideas was not restricted to mere

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conversations; they were carried into action by Mrs. Thwaytes in a sufficiently distinct and unquestionable manner.

In the first place, there is the London drawing-room, furnished at the expense of about 15,000*l.*, for no other occasion than the day of judgment—never brought into use on any one single occasion, never dismantled, never forgotten, always prepared, and for years persistently spoken of by the testatrix as dedicated to that event. Mr. Clarke, who, as foreman to Messrs. Gillow, had had these decorations in hand, is sent for by the testatrix, and, without apparent reason or motive (for he needed no charitable help), is told that he is to receive 50*l.* a year. This annuity he received for many years, during which he was constantly sent for by Mrs. Thwaytes, for no other purpose than to listen to the religious ideas which she poured forth for his edification by the hour at a time. It is difficult to forbear the conclusion that this annuity was, in the mind of Mrs. Thwaytes, the fitting reward for the part he had borne in the sacred work of preparing for the great judgment.

Then there is the tiara of diamonds, bought for the decoration of her own person—never worn, but kept in reserve, and devoted to the same august occasion.

Again, her assumption of the Divinity was not confined to words. It was proved by one very credible witness, if not more, that on more than one occasion she permitted, if she did not invite, Mrs. Curtis to fall down on her knees and worship her. It is true that Mrs. Curtis endeavoured to explain the position in which she was found in a different way; but the evidence of the fact, coupled with Mrs. Thwaytes' expressions concerning it, satisfies the Court of this conduct and its true character.

It is well to pause here, and ask if any sane person ever conceived or fostered such ideas as these? Some of them—such as being the Bride of Christ—that there was a mystical and spiritual connection between herself and Dr. Smith, which enabled him to read her thoughts—that she was born anew in some mysterious sense, beyond a merely spiritual regeneration—I can conceive it just possible to have been bred in a mind not very highly educated or robust, acted upon by an excitable, nervous, enthusiastic temperament. But will anything we know of the natural and healthy working of the human mind extend to the conception of a false

identity, such as that involved in her being one of the Holy Trinity, or the Virgin Mary? Or, still further, to her assumption of the Divine attributes in the preposterous expectation that she should sit in judgment on the rest of mankind, culminating, as it did, in the puerile bathos of the London drawing-room, with its velvet and silk, as the scene of her future glory? Religious and fanatical enthusiasm will account for much, but did it ever stretch so far and stoop so low?

It is not, assuredly, in the region of enthusiasm that we must look for the calm exercise of pure reason, temperate and well-balanced ideas, or exactness of logical thought. Still less must we expect that the fervour of fanaticism will follow in the slow steps of philosophy, reaching its conclusions by the graduated steps of proof.

It is hardly, then, by the mere test of their reasonableness, that the wild thoughts of religious enthusiasts can be brought to a standard, for judgment of their sanity.

But there are, surely, limits, even on so mystical a subject, within which the human mind in a state of health is unreasonable or extravagant; and the common experience of life gives us a sense of those limits sufficient for the formation of judgment in most cases. To draw the exact line, if there be one, which defines such limits, may be impossible; but to affirm that some instances surpass it, is not so. "No one," said Burke, "can say where twilight begins or ends, but there is ample distinction between day and night."

If, then, I were bound, stopping here, to pronounce, upon the bare contemplation of these ideas, without reference to the conduct or habits of the person who entertained them, or the mode in which they were exhibited, whether they were such as sane people have been known to entertain, I fear I should be compelled to answer in the negative.

But the conduct and habits of the deceased, and the mode in which, and the occasions on which, she manifested her religious thoughts and ideas, cannot be thus excluded. They form, perhaps, more valuable materials for judgment than the character of the ideas themselves, and press with remarkable weight in the same direction.

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Mrs. Thwaytes did not, by any acts of her life, nor by any demeanour, exhibit herself as a religious enthusiast—charitable she appears to have been; but, save in the extraordinary conversations in which the questionable ideas above quoted were revealed, the subject of religion was rarely or never approached by her. She never went to church, or sought communion with ministers of any form of religion, and, with one exception, relating to a book she is not known to have read, was wholly without religious literature. Very ignorant too, she was, according to one of the plaintiff's witnesses, on everything connected with the sacred subject. She is pourtrayed in the evidence as a very ordinary woman, not deficient in shrewd understanding, but wholly without that warmth and fervour which the temperament of an enthusiast invariably discloses. And lastly, she preached no faith; she held forth and aloud to the world no doctrines, and she sought no converts; not to all who were willing to hear, careless of occasion and reckless of opposition, did she raise her voice to proclaim any religious truth, foregoing the comforts of ordinary life for the agitated career of inspired zeal. Far from it. It was in private and mostly to her servants or inferiors, when she was alone with them, that she gave vent to her extravagances, and then only if she was not opposed. Contradiction or dissent called forth, "I see you are not rightly constituted," or, "Go and take a walk," and the subject was not renewed. Then, for her daily life—her early but regular dinner, her equally regular drive, her afternoon sleep, her game of whist in the evening, and then to an early bed, make up a picture in which it is hard indeed to recognize the character of an enthusiast, or trace the temper of a fanatic. But if this be so, is it right, in forming a judgment of her sanity, to compare her with people of that character and temper, and, in scrutinizing her opinions or ideas, to make the allowances which experience warns us that we must make, when we attempt to bring their conceptions to the ordinary standard of mankind? I conceive not.

And yet it is here that the very foundation of the able arguments addressed to the Court on the part of the plaintiffs is laid. The wildest thoughts of Johanna Southcote or John Bunyan, and some questionable assertions attributed to Luther, are produced and

put forward as a fitting standard of sanity for such a woman as Mrs. Thwaytes, and invoked as the examples by which alone her extravagances can be reconciled with a sound mind. Can they, with any propriety of judgment, be so applied? Some thoughtful remarks on this head will be found in Dr. Ray's work on the "Medical Jurisprudence of Insanity." He says: "To lay down any particular definition of mania founded on symptoms, and to consider every person mad who may happen to come within the range of its application, would induce the ridiculous consequence of making a large portion of mankind of unsound mind. Some men's ordinary habits so closely resemble the behaviour of the mad, that a stranger would be easily deceived; as in the opposite case, where the confirmed monomaniac by carefully abstaining from the mention of his hallucinations, has the semblance of a perfectly rational man. Hence, when the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too commonly the custom, his natural character should be diligently investigated, in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word, he is to be compared with himself, not with others, and if there have been no departure from his ordinary manifestations, he is to be judged sane; although it cannot be denied that striking peculiarities of character, such as amount to *eccentricity*, furnish strong ground of suspicion of predisposition to madness."

"Compare a man with himself," says Dr. Ray, "his acts and thoughts now, with his acts and thoughts at some previous period, when his mind was in undoubted health. You will the better detect what is morbid, than if you set up a general comparison with the thoughts and acts of mankind." It is a variation of this reflection to say, compare a man's acts and thoughts with those of mankind whom in general temperament and character he most resembles.

It may be that there is no period of undoubted health in the previous life of the patient to which you can refer, or the details of it may be wanting; and in the absence of these, the best standard of comparison will present itself in persons whose general temperament and character have some resemblance, the closer the

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better, to those of the individual whose sanity is in question. It is upon no other method of reasoning that mankind habitually form their judgment in such matters.

Individual character, like the human face, though made up of features common to all, is endless in its varieties. But experience teaches us that there are general attributes which serve to divide the bulk of mankind into many classes of character, and these classes present marked contrasts. The hilarious contrasts with the dejected; the nervous and sensitive with the coarse and bluff; the vivacious with the habitually silent and reserved; the bold and confident with the timid and weak; the open and lavish with the crafty and mean; and lastly, the highly-wrought and enthusiastic with the tame, colourless, and common-place. And these general characteristics are never practically omitted from the materials of judgment when in common life we pass an opinion upon the conduct of others. We habitually make allowance for them, whether we scrutinize that conduct for praise or blame, or whether we rely upon it for our own guidance, and not the less when we have to ask ourselves whether the conduct of an individual can be reconciled with soundness of mind. Things said and done by one sort of person would hardly surprise us, the same words and deeds emanating from another of an opposite character we should esteem so unaccountable as to argue disease.

In the former we perceive excesses beyond the ordinary standard to be in harmony with their general character, and we recognize them as features of it. In the latter we perceive extravagances as much at variance with their own ordinary character and deportment as with that of the rest of the world, and we pronounce them to be the offspring of morbid influence. It is, therefore, to mislead the judgment, not to guide it, to avert the true conclusion, not to induce it, that a parallel should be set up between such a person as Mrs. Thwaytes and those whose religious fervour has rendered them famous. And yet, if this argument fails, what warrant is there for affirming that Mrs. Thwaytes' ideas were (within the range of experience) such as sane people have been known to entertain?

I turn now to the comparison with the insane. Dr. Prichard, in his well-known work on "Insanity in Relation to Legal Questions,"

speaks of the following peculiarities attending monomania: "The illusions or false impressions of the monomaniac have always, as I have said, reference to himself; they relate sometimes to his fortune, rank, or personal identity; at others, to his health of body and his sensations. In the former class of cases, the patient, feeling himself unhappy, fancies himself in debt, ruined, betrayed, or, being disposed to an opposite state of feelings, possessed of great wealth and affluence, and superior to all mankind. The difference of these impressions seems to depend upon the different state of spirits; the persons affected by the former kind of impressions are those whose minds are predisposed to gloom and forebodings of ill; the latter kind affect the sanguine and excitable. Many fancy themselves kings or emperors, prophets or the pope. I have seen a French lunatic who exclaimed, with great appearance of dignity: 'Je suis le pape, le saint-père de l'Eglise.'"

"Among monomaniacs," says Esquirol, "some believe themselves to be divine beings, and pretend to hold communication with heaven, declare that they have a commission from above, and set up for prophets or for divines; they fancy themselves supernaturally enlightened, and possessed of supernatural power."

And again: "We have, at the Salpêtrière," continues the same writer, "a young woman who had received some instruction in science, and who fancies that she directs the sun, the moon, and clouds; when she is impatient of her abode in the hospital, she sometimes threatens us with rain, sometimes with drought. I have seen in the same hospital many females who fancied themselves empresses. Many think themselves kings and potentates, and issue commands to their subjects; some believe themselves to be men of fame and distinguished philosophers, others are celebrated poets or orators, and it is necessary to listen to their compositions in order to avoid giving them severe offence; others, loaded with riches, distribute their benefits, and disperse their fortune on all who come to them in want."

Now, the whole of Mrs. Thwaytes' religious extravagances appear to have related to herself and her greatness; but how singularly this description accords with the following:

"I shall never die."

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"Mrs. Curtis is a child of God; she is obliged to fall down on her knees and worship me, for she knows I am the Holy Ghost."

"I don't wonder at people looking at me. They little think who I am. I am the Holy Ghost."

"It is no use going to church, I cannot pray to myself."

"The Queen little thinks who I am. When the work is finished we shall have Buckingham Palace and Windsor Castle, but God says we must have patience."

And again, after hearing a sermon on the Holy Ghost at Canterbury, on nearly the only occasion she ever went to church, "The man little thought who I was."

Or, again, "As you get older, I get younger, and shall, to the end of the world. I and the doctor are superior beings."

"If God lost me, all would go back to chaos."

"I and the doctor make the thunder and lightning. We are in our glory in a good thunderstorm."

"People wonder I don't go to church. They don't know that I am immortal, that I am equal with God."

The Court now turns to the arguments of the plaintiffs. And first let me deal with one which was strongly relied upon, and stands on the very threshold of the inquiry. If Mrs. Thwaytes was insane, why did not Mrs. Tebbitt assert that fact in her lifetime, and bring it to the test by a commission? She had, it is said, every motive to do so. As her next of kin, she would have prevented the dissipation of the funds during her sister's life, and secured them to herself at her death.

It is impossible not to be struck with the weight of this argument at the first blush, especially, as an argumentum ad hominem. But, as a guide for the Court which has to determine, not the candour of the defendant's conduct, or the genuineness of her belief, but the fact of the deceased's sanity, it loses much of this weight. In this aspect it resolves itself into this. If Mrs. Tebbitt really believed her sister insane, would she have postponed inquiry till her death? But she did so postpone it, therefore she did not believe her insane.

At most, then, the argument reaches no further than Mrs. Tebbitt's belief. This is some way on the road to the fact itself, but does not reach it. It, therefore, falls short of the mark. But

does it even prove so much as Mrs. Tebbitt's belief that her sister's mind was sound?

Several practical considerations present themselves, which may account for Mrs. Tebbitt's conduct without any such conclusion. Did she feel assured that her sister's estrangement would continue; and was it certain that in the end her sister would not, by her will, largely benefit herself or her family? At any rate, were these expectations so improbable that it was worth while to risk all by a suit which would be hotly contested, regardless of expense, and which, if unsuccessful, would wholly destroy such expectations?

Again (whatever she thought herself), did she, or could she know, without setting on foot an inquiry, which would be sure to come to her sister's ears, what amount of evidence could be collected from those who had been in Mrs. Thwaytes' service, to prove in a court of justice her sayings and doings during a long course of years? And, without this knowledge, could she calculate her chances of success? She had no access to Mrs. Thwaytes herself, and those who surrounded her were little likely to assist Mrs. Tebbitt's views. Add to this, that the natural prejudice of a jury against stripping a person of the control of her person and property during her life, stood in Mrs. Tebbitt's way, and was likely to obscure a clear view, and obstruct a true conclusion. The property was so ample, that the fear of its dissipation would not pass for much. Lastly, take Mrs. Tebbitt's conduct at its worst. Assume that she knew all she now knows, both of her sister's condition, and the proof she could give of it, and that, knowing all this, she thought she could fight her battle with greater advantage after her sister's death than before it, Mrs. Tebbitt's good faith and candour would hardly survive such an assumption, but the evidence would remain; the issue of unsoundness would still stand to be solved by it, and the utmost effect on the Court ought to be vigilance and suspicion of a case thus handled, and distrust of a person taking such precautions.

I pass now to what I esteem the strongest point in the plaintiffs' favour. I mean, what is said to have been Mrs. Thwaytes' conduct in the ordinary affairs of life. It is asked with surprise, whether it be possible to hold that a woman who for the last thirty years of her life conducted herself with propriety and prudence at

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all points of contact with others, discharging all ordinary duties, exhibiting neither excess nor extravagance of conduct or deportment in common matters, had, through the whole of that period, a mind diseased or an intellect deranged?

No one can deny the force of this question. It is so habitual with us all to expect some common and plain signs of derangement in the daily life of a deranged person, that their absence makes belief in mental disease difficult. And yet, by those who have studied such matters, a belief in such a state of things as possible cannot be resisted. It has been established as a matter of fact and experience, over and over again, that the disease called monomania exists. Nor does this fact rest only on medical evidence. It has been adopted as the basis of legal decision. No terms can be wider than those used in *Waring* v. *Waring* (1) to describe it: "Nothing is more certain than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by physicians, 'Monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind: a person shall be of sound mind, to all appearance, upon all subjects save one or two; and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination."

Whatever, therefore, Mrs. Thwaytes' conduct, or apparent capacity in the management of her property, or ordinary behaviour, it is quite possible that she nurtured insane ideas or hallucinations on particular subjects, and was thus diseased in mind. The proper weight, then, of this argument, is in the inquiry whether these supposed insane ideas or hallucinations really existed as the symptoms of mental disease, for, once shewn to exist, the argument from her general capacity wholly fails. And in this direction the argument has engaged the anxious attention of the Court, pressing it to all reasonable explanation of Mrs. Thwaytes' strange thoughts and words, save that of insanity or disease. But the facts seem hardly to support the broad conclusion drawn from them. If so great a stress is laid on the supposed sanity of Mrs. Thwaytes' general conduct, it behoves us to scrutinize narrowly the evidence upon which its character of sanity rests.

(1) 6 Moo. P. C. at p. 350.

Is it, then, quite certain that Mrs. Thwaytes did act discreetly and prudently in ordinary affairs?

Is it true that she did not betray any weakness of mind in her ordinary conduct?

I was much startled on hearing that, with a fortune of half a million of money, she yet did not leave behind her more than she had received from her husband. Her scale of living was detailed to the Court; and her banker's book at Worthing bears out the statement that two or three thousand pounds a year would probably cover the expenses of it. Some annuities, too, she gave in charity, which may not be included in the above amount. To Dr. Smith she gave 2000*l.* a year, and to Mr. Smith she gave 400*l.* a year. Besides this, she gave large sums in money to Dr. Smith, amounting it is said, altogether, to between 40,000*l* and 50,000*l.*

What became of the rest? On what objects was it bestowed, and with what ends? Ordinary prudence would have accumulated whatever the reasonable demands of charity or generosity had not diffused. But this great income—how and by what means was it managed?

Dr. Smith had 2000*l.* a year from her, but his sole business, he told us, in connection with her property, was to receive her dividends and pay them into her bankers. That Mrs. Thwaytes herself, an illiterate woman and unpractised in business affairs, should have sought some one to manage the property for her, investing and accumulating what was not required for her expenses, was no more than reasonable; but she is not shewn to have done so, and here her prudence was at fault.

To Mr. Samuel Smith she paid 400*l.* a year, and he appears to have lived in the house with her and to have managed her household. It is true that she used herself to give cheques to her head-servant in payment of the weekly or monthly accounts, but his book of accounts used to be put into the library, and probably looked over (so said the witness) by Mr. Smith, and Mrs. Thwaytes is not shewn to have done more than draw the cheque to pay it. In a household so managed, there was not much room for the exhibition on Mrs. Thwaytes' part of the worldly prudence and business ability with which she is credited.

Many account books were laid before the Court, and some of

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them contain numerous entries in Mrs. Thwaytes' writing. These entries are in many parts quite unintelligible—in all quite destitute of method; and no one book exhibits a continuous account in her writing of any definite character. In truth, the entries are rather isolated memoranda than anything else—the work of an illiterate hand, throwing no light on the capacity for management of the writer either way. If these books had not been, many of them, mutilated, large portions having been cut out, they might, perhaps, have shed more light on the subject; but as it is, they certainly are not vouchers for Mrs. Thwaytes' business powers or prudent habits. These reflections induce the conclusion that the broad result of Mrs. Thwaytes' supposed prudent management of her affairs is a lavish expenditure of a very large income in the indulgence of small wants and desires; while, in controlling the details of her household, she is not shewn to have had a guiding part.

The capacity to manage property is always a topic well worthy of consideration in inquiries like the present. But in most cases it implies the guidance and restraint involved in the control of expenditure to the bounds of an income more or less limited. Mrs. Thwaytes' income was too large relatively to her wants to make such a test possible. And the only forms in which she could well exhibit mental capacity on this subject were those in which there is no proof of her success—judicious accumulation, or judicious generosity to others, the details of her household being in great part, if not wholly, in the hands of Mr. Samuel Smith. It would be absurd to contend that her conduct in these matters was such as affirmatively to argue insanity. But it is put forward by the plaintiffs as affirmative proof of mental soundness, and the question is, whether upon due examination it sustains that burden.

Let me further examine Mrs. Thwaytes' general conduct. Were there no occasions on which she spoke of things as existing of which her own senses or reason, if her mind had been healthy, ought to have disabused her? She fancied that her husband had tried to poison her. This she asserted many times and to many witnesses. The attempt to explain it away, as referring only to his insisting on some occasion upon her taking mercury as a medicine, fails. For the chemist is called, who remembers her bringing food to be

analysed. Moreover, the charge was not confined to her husband. It extended to Mrs. Tebbitts, in whose house she declared she saw the arsenic floating on the liquid she was going to drink, and in later years to one, if not two, of her servants. At one time she acted upon this assumption by refusing to eat salt.

The Court cannot doubt that the charges thus made and repeated at different times, and against different persons, had no foundation in fact, and were but hallucinations of the mind. As such, they hardly bear out the assertion that in all but religious matters the testatrix was rational, prudent, and mentally sound.

A similar remark would apply to the extraordinary impression and belief that she was physically blind for many days or weeks, which induced her to sit away from the window, with her face close against the wall, a position in which Mrs. Tebbitt and Mrs. Cooke several times found her, and a fact to which she constantly referred in talking to others. And again to the story of the baby-linen, bought for the birth of our Saviour, and carefully preserved for years in anticipation of that event.

In the same category is her statement that "her body was swelling and covered with stabs," and the ridiculous story of the footman to whom she gravely presented a rotten peach, telling him to "take it away carefully; you never saw one like it before and never will again; it is one of a dish that came from the garden of heaven." This last may be called an idle story, but the witness who deposed to it gave the Court no reason to doubt him, and certainly his demeanour was not that of a person likely to invent so peculiar a tale.

I pass now to her conduct towards her relations—a not unimportant topic. The natural play of the affections gives the last assurance of a mind at ease, and its interruption, often the first sign of mental disorder. This is the way she spoke of them:

"They are all doomed to perdition, especially Robert."

"This child, I am permitted to tell you, is born for the devil."

"Mrs. Tebbitt is a wretch—a child of the devil. The Father" (did that mean Dr. Smith?) "has told me to cut her off, and she will have the hottest place in hell. The Father told me so."

And again, to another witness:

"The Father has told me to cut her off, and that she is a wretch,

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and must be given up entirely to the devil. That she was a child of the devil from the beginning."

Her conduct to them was no less peculiar. For some time after her accession to great wealth she appeared friendly to her sister, if not kind. She took a house for her, and eventually gave her a large sum of money, 30,000*l*. This was in 1835. In the year 1838 or 1839 she suddenly ceased to hold any intercourse with her. She sent for her, and called up all the servants into the adjoining room, with the intervening door open, to hear what passed. And she then dismissed her in a very violent manner, saying, "I have been advised by my friends to shut my doors against you and all belonging to you." And she never saw her again. One naturally asks the cause of so violent a rupture and so permanent an estrangement. It was most trifling. Mrs. Thwaytes had offered to get Mrs. Tebbitt a cadetship for one of her sons. He did not like it, and Mrs. Tebbitt told her so, and declined it. This was the whole cause of quarrel. And that it was so does not rest on the statements of Mrs. Tebbitt alone. Elizabeth Coulson, who was housekeeper to the deceased for seven years, from 1854 to 1861, says: "She often spoke of her sister, and always as one of the devil-head. She said she had had a quarrel with her some years before respecting one of her sons, to whom she had offered a cadetship and was refused," &c. The remarkable feature in this conduct of Mrs. Thwaytes is, not so much the fact of the estrangement of near relations for a wholly inadequate cause (which, unfortunately, too often happens), as the extravagance of the terms in which she afterwards expressed her feelings, and the allusions to divine command for thus treating her sister.

In the year 1846 an incident took place relative to Mrs. Parrott, a daughter of defendant's, which ought to be considered in connection with this conduct to the defendant herself. Mrs. Parrott had been received by her with kindness. Mrs. Thwaytes asked her to come and spend a day with her, and offered to send her carriage to fetch her. Before the day came, and without any intermediate communication of any kind, Mrs. Thwaytes wrote her this characteristic letter:

"Charman Dean, December 5, 1846.

"Dear Maria,—The interposition of Providence has prevented

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our again meeting. Better it is so, for it cannot be productive of good, but only tend to disturb my peace by rousing into action those poignant and bitter feelings that has so long been buryed in an oblivion though not forgotten—I meen the unparalleled brutality of your parents towards me—the one whose conscience perished, cut off in the midst of his criminality towards me and summoned before the Greate and just Judge; the other who has nither heart nor conscience still lives on; but I have made up my mind never, never more to see one of the family, so must beg no further intrusion. I am happy to find you are united to a good and kind man, and may you and him live a long life in the same unity of spirit is the ardent wish of yours sincerely,—A. Thwaytes."

"Unparalleled brutality," and "in the midst of his criminality towards me," are strong terms for a rational person to employ in speaking of a groundless refusal of a kind offer; while the "interposition of Providence" seems to connect the feelings of the writer with her strange religious views.

But, if in all this Mrs. Thwaytes betrayed a vehemence and abhorrence for her relations not consonant with reason or the conduct of sane people, was it such as the experience of the insane would indicate as probable?

We have the authority of Dr. Prichard for the following passage:—"It is well known to those who are conversant with the insane, that in persons who are considered as labouring under monomania the mind is otherwise disordered and weakened, though the characteristic illusion is the most striking phenomenon. The social affections are either obliterated or perverted; some ruling passion seems to have entire possession of the mind, and the hallucination is in harmony with it, and seems to have had its origin in the intense excitement of the predominant feeling; this is always a selfish desire or apprehension, and the illusory ideas relate to the personal state and circumstances of the individual.

"In most cases of exclusive or partial mental illusion the persons affected are abstracted, absent, incapable of applying themselves to any occupation, or even of reading with attention; they either forget the objects of their strongest attachment, or, if they think of them at all, it is only to *accuse them of injustice and cruelty* on the most *frivolous pretexts*, or the most improbable suspicions."

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Another, and, if possible, more important aspect of Mrs. Thwaytes' general conduct remains to be studied—her relation with the two Smiths. Was it natural and rational?

While her husband was lying dead, and before his burial, she made the draft will of the 19th of December, 1834, by which, with the exception of about 50,000*l.* she bequeathed all the vast property she had just acquired to Dr. Smith. Then followed an annuity of 2000*l.* a year, and in after years donations to the extent of nearly 50,000*l.*

He was a stranger in blood to her, first attended her professionally in 1832, and is not shewn, up to the time of the above will, to have rendered her any service beyond ordinary medical advice, or filled any other relation to her than that of medical adviser. In after years he added to his medical advice the trouble of receiving her dividends and paying them into her bankers. What were her sentiments regarding a person thus circumstanced, and what was the character and extent of the influence he exercised over her?

She said that "Mr. Samuel Smith, being the doctor's brother, she was obliged to admit him. That if he had not been, she would have shut the door against him." And to another witness, "That she could never cast him off."

"I'm not going to give you any more presents," she said, "Simms says I'm not to do it."

Dr. Smith used to visit her once a fortnight. She said "they always managed all their affairs when he came down—that was the express time the work was carried on." What was the work that was then carried on? If Mrs. Cooke may be believed, the nature of the work may be surmised.

"She often told me that at one stage of the work the doctor required large sums of money to carry on the work."

"Once, when she had 3000*l.* or 4000*l.* at her bankers, she said, 'Oh, doctor, you had better have it, you are always wanting money for the work.'"

When she dismissed Mrs. Tebbitt she said, "I am persuaded by my friends to shut the door against you," &c. Who were these friends? It is difficult to suppose that Dr. Smith was not one of them.

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I think it, therefore, probable that in the selection of Mr. Samuel Smith to live with her, and in the rupture with her relations, and in the expenditure of her money, Dr. Smith had considerable influence over her. On what was this influence founded? He first attended her in what he himself describes as a "low fever, with much nervous excitement," two years before Mr. Thwaytes' death. This would be in 1832. It was this illness to which she so often referred as the period when she was born anew, and was blind, &c. And to this no doubt she referred in the following statement, repeated by a very trustworthy witness, named Gardiner: She said that "God was her Father; that she was brought into the work *in connection with Dr. Smith*—and that they were to carry out the purposes of God; that they together formed the Trinity, and that from the time that God had communicated this to her she had been in direct communication with him."

Gardiner, the witness, was then asked, "Did she say how long ago that was?" "She went back to 1832; I think between 1830 and 1840; but I think it was 1832."

It is needless to refer to the uniformity with which all the witnesses for the defendant depose to Mrs. Thwaytes' constant reference to the mystical association with Dr. Smith thus inaugurated, but it is most instructive to remark that Dr. Smith himself wholly repudiates it. He denies that she ever spoke to him about any particular spiritual work in which he was engaged with her. "I am quite sure of that," he said.

This answer of Dr. Smith appears to refute the suggestion made in argument, that the "great work" so often spoken of was nothing but a holy mission to make good and charitable use of her wealth.

It is fair, then, to infer on this testimony that Mrs. Thwaytes, when debilitated by her fever, and in a highly nervous condition, conceived that she had a communication from heaven announcing a mystic and spiritual connection between herself and Dr. Smith, which had no existence, and was never the subject of conversation between them, and that this idea once conceived took paramount possession of her mind. What wonder, then, that she should believe that he knew all her thoughts, be guided by him in her conduct to others, and load him with benefits during her life, and bequeath a vast sum of money to him after her death?

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But with what truth can it be affirmed of a person thus influenced and thus acting, that she was independent, rational, and sensible in the conduct of ordinary life, and shewed no weakness of mind but in abstract religious speculations?

Lastly, it was argued for the plaintiffs, that assuming Mrs. Thwaytes to have been of unsound mind, the evidence of the defendant only extended to the month of November, 1864, whereas the will in question is dated in March, 1866.

If unsoundness extending over years be once proved by those who oppose a will, there is no doubt as a proposition of law that they are not bound to carry the evidence of insane actions or delusions up to the very moment of the testament. A diseased state of mind once proved to have established itself, would be presumed to continue, and the burthen of shewing that health had been restored falls upon those who assert it.

The sole proof, so far as I am aware, offered by the plaintiffs in discharge of this obligation is the fact that Mrs. Thwaytes, about the month of September, 1864, purchased a vault for her own burial, and that of Dr. Smith. And the inference drawn is that, if ever she had thought herself the Holy Ghost or immortal in former years, she had then ceased to do so. But this inference, I think, assumes the fact in dispute, viz., was Mrs. Thwaytes a rational or irrational person on these subjects? If rational, the purchase of the vault would be strong to shew that she had abandoned the notion of immortality. But if irrational or insane, she might, I conceive, be quite capable of speaking of the place of her burial in one half hour, and talking of her immortality or spiritual nature in the next. It is of the essence of an insane delusion that as it has no basis in reason, so it cannot by reason be dispersed, and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent.

It would, I think, have been more to the purpose on this head, if the plaintiffs had offered to the Court the testimony of Mrs. Simmonds, and the other maid-servants of whom the witness Lester spoke as having been with Mrs. Thwaytes up to her death, and one of whom, Mrs. Simmonds, was proved to be present in court. The plaintiffs were challenged to produce her by the other side, and she was shewn to have received 1000*l.* not long

before Mrs. Thwaytes' death. These witnesses were said by Lester to be still living in the house; all have legacies under the will, and therefore neither beyond the plaintiffs' control, nor hostile to their interests. Their evidence could not have failed to have shed light on the state of Mrs. Thwaytes' mind in the last two years of her life.

It is difficult, then, upon a just review of Mrs. Thwaytes' life and conduct, as revealed in the evidence, to assert that, apart from religious matters, she exhibited no weakness of mind—no falling off from the standard of ordinary prudence and wisdom.

To her relatives her conduct must be considered as fitful and unreasonable. She was either inordinately vindictive on trivial provocation, or she fancied wrongs which did not exist. She suspected herself to be the object of attempts to administer poison, and believed herself to be really blind. In regard of her property, giving her credit for charity not always wisely bestowed, her sole merit seems to have been that, if she did nothing to improve it, or augment it, by the cumulation of that which she could not spend, she at least managed to retain the greater part of it. But she purchased the aid of the two gentlemen who assisted her at an extravagant sum. Indeed, her position in relation to Dr. Smith, if it rested on no mystical religious association, betrayed great weakness and lavish indifference to money.

Such are the conclusions which the evidence, as it stands, makes manifest. But has the Court a full picture of Mrs. Thwaytes' life? And is it certain that if her entire demeanour and conduct, as it shewed itself to those among whom she lived (and they were not many), were freely and fully placed before the Court, the list of her extravagances would not be augmented? This is a most momentous question. It lies at the root of the plaintiffs' contention, that in ordinary life she was prudent and conducted herself like other people. And yet, unfortunately, the provisions of the will in controversy are such as to make this question a hard one to answer. For the will gives large legacies, ranging from 5000*l.* to 15,000*l.*, to almost every individual, man or woman, in whose society the testatrix moved, or who could be said socially to know anything about her. The tendency of these dispositions to close the channels of evidence, and narrow the memories of

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witnesses, can hardly be doubted. A recollection to be exerted in destruction of their own interests must be vigorous indeed, if it go the full length of the truth.

It is fit to bring these remarks to a close. The conclusions of the Court as to the validity of this will must have been made already apparent. I think it cannot stand. I cannot reconcile the proved hallucinations of the testatrix in the matter of religion with the action of a sound and healthy mind on the one hand; and, on the other, I find them to be just such as a diseased mind is known to engender. I can find no excuse or explanation in her temperament or general character for her absurdities on this special subject.

When I turn from this subject to her general conduct and demeanour, I find the sources of information narrowed and diverted by the dispositions of the will. But, with such light as I have, I find clear traces of insane suspicions at one time, and insane aversions at another—a large fortune ill-husbanded; relations estranged; extravagant benefits conferred on those about her, though strangers in blood; a secluded life; and a submission to the will of another, apparently founded on the special subject of her hallucinations, for which the external and visible relations of the parties can hardly account.

A life with such features is not calculated to rebut the conclusions to be drawn from her proved delusions on the subject of religion.

It was decided in the case of *Sutton* v. *Sadler* (1) that before a will could be pronounced valid, the Court or jury must be able, affirmatively, on a review of the whole evidence, to declare itself satisfied that the testator was of sound mind, memory, and understanding, at the time of its execution.

The Court is not so satisfied in this case, and must pronounce against this will.

It remains to be pointed out that the conclusion at which the Court has thus arrived of Mrs. Thwaytes' general incapacity, throws many considerations into the shade which would otherwise have occupied a prominent place in its deliberations. If Mrs. Thwaytes had been esteemed capable of making a will at all, a

(1) 3 C. B. (N.S.) 87.

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grave question would have arisen, whether that capacity would have supported a will so made, and with such dispositions as the will here in question. The law has ever been watchful and jealous of wills made under religious influences, and especially so when those influences connect themselves with any individual who is the object of the testator's bounty. Before this will, therefore, could have been established, the relations of Dr. Smith with the testatrix must have been further scrutinized and explained, and the Court satisfied that, in making him and his brother residuary legatees to the amount, as it is computed, of 180,000*l.*, the testatrix was acting freely, under the pressure of no imaginary duty or paramount obligation—the influence of no delusion as to Dr. Smith's spiritual being, and the guidance of no baseless religious dream.

I make no order as to costs; to decree them out of the estate would be to make the defendant pay them.

Proctors for plaintiffs: *Nelson & Son.*
Proctors for Mrs. Tebbitt: *Brooks & Co.*
Solicitor for Mr. Walter Tebbitt and Mrs. Cook: *A. T. Hewitt.*

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Jan. 18.

Custody of Child—Father—Charge of Dissoluteness—Detectives—Interveners—Costs.

The Court views with disfavour an attempt to get up a charge of adultery against a husband, who has obtained a decree dissolving his marriage, by tracking him from place to place, with a view to obtain an order depriving him of the custody of his children.

Where relations intervene in an application for the custody of a child, they do so at the peril of being condemned in costs, if their intervention is unsuccessful.

Semble, where a petitioner (the father), after a decree dissolving his marriage, is shewn to be leading a notoriously dissolute life, the Court will hold him disqualified to have the custody of his child.

An application for the dismissal of an appeal by the appellant should be made to the full Court, and not to the Judge Ordinary.

THIS was an application made by the petitioner, who had obtained a decree nisi for the dissolution of his marriage on the

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ground of the respondent's adultery, for an order giving him the custody of the only child of the marriage, a boy of the age of six years. The application was opposed by the respondent, and two of her brothers, who had intervened, on the ground that since the decree had been pronounced the petitioner had been leading an unchaste life, and had been for about three weeks cohabiting with a woman. This charge was denied by the petitioner, and the evidence in support of it was mainly that of a detective, in the employ of the respondent and the interveners, who had been tracking the petitioner in his movements for the purpose of establishing such a case against him as would induce the Court to deprive him of the custody of the child.

Hannen moved for the order on behalf of the petitioner.
Dr. Spinks opposed for the respondent.
Sir R. P. Collier, Q.C., and *Searle*, opposed for the interveners.

THE JUDGE ORDINARY. In this case all the merits appear to me to concur in favour of the claim of the petitioner (the father) to retain the custody of his child. It is said he is disqualified (amongst other reasons) because he is leading a dissolute life, and has been cohabiting for some time, under an assumed name, with a woman. But I think that this charge, which rests on the evidence of a detective who followed this gentleman about, and made inquiries with a view to establish it, is rebutted. And here the Court cannot help saying, that it deprecates extremely this mode of inquiring into the life of a man who is occupying a respectable position, living among respectable people, passing his life among his relations and connections and friends, many of whom have wives and families, and who, to all outward appearance, is leading as respectable a life as any gentleman can do,—I say, under these circumstances, the Court deprecates the employment of a detective officer to work out where a man goes every day, for the purpose of depriving him of the custody of his child by shewing he has on some occasion visited a woman for immoral purposes. I think that is a proceeding which ought not to be resorted to. If Mr. March had been leading a notoriously dissolute life, if he had been in the habit of visiting prostitutes, and of spending his time in public-houses, the Court might hold that such a mode of life disqualified him from

having the custody of his infant child; but when a man is living a notoriously respectable life, the tracking his steps day by day for the purpose of shewing he has had connection with this or that woman, is a course which I think ought not to be adopted to rob him of the custody of his child. I am, therefore, perfectly satisfied that Mr. March ought to have the custody of his child, and make an order accordingly.

I should also say, with respect to the interveners in this case, as in all other cases where the relations intervene, they must do so at the peril of costs, and, as there is no ground for their intervention in this case, it must be on payment of costs by them.

Dec. 20, 1866. *Sir R. P. Collier, Q.C.* (*Searle* with him). The respondent and interveners have appealed against the order made in this case giving the custody of the child to the petitioner. They are desirous to postpone, not to abandon, this appeal, on the ground that since the order was made they have discovered new materials, on which they propose to found a further application to the Court to vary the order made, which application may render the appeal unnecessary.

Gates, contrà.

THE JUDGE ORDINARY. Any order the Court makes for the custody of a child is in itself temporary, and may be set aside or varied on a change of circumstances, or other sufficient cause shewn. But the respondent cannot be allowed to give notice of appeal, and then give notice that she is not sure that she will proceed with the appeal, and put it off for another term. If it be desired that the appeal should be dismissed, an application for that purpose should be made to the full Court.

Jan. 18, 1867. Before the full Court (the JUDGE ORDINARY, WILLES and BLACKBURN, JJ.).

Searle, for the respondent, moved that the appeal be dismissed.

Hannen, for the petitioner. The appeal is on behalf of the interveners as well as the respondent. Both should, therefore, be condemned in costs. The respondent has an independent income, out of which she may pay them.

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THE JUDGE ORDINARY. The Court is of opinion that the appeal must be dismissed with costs against both the parties.

Appeal dismissed with costs.

Solicitors for petitioner: *Pattison & Freeman.*
Proctors for respondent: *Jennings & Son.*
Solicitors for interveners: *Freshfield & Co.*

April 25.

MARCH *v.* MARCH AND PALUMBO.

Marriage Settlement—Income of Guilty Wife—Principle of Allotment—Distribution between Child and Petitioner—Divorce Amendment Act (22 & 23 *Vict. c.* 61), *s.* 5—*Form of Order—Practice.*

Where the husband (the petitioner) had only a small official income, and the respondent (by reason of whose adultery the marriage was dissolved) was a lady of considerable fortune, in which she took the first life interest, the Court, in dealing with her marriage settlement, allotted to the husband such a portion of her settled property as would place him somewhat in the status in which he would have been had the union continued.

The joint annual income of the parties amounted to 1718*l.* (260*l.* being derived from the petitioner's official appointment, and 1458*l.* from property brought into settlement by the respondent, or bequeathed to her separate use by her mother), the Judge Ordinary having ordered to be paid out of the income of the respondent's settled property 200*l.* per annum to the petitioner, during the minority of the son of the marriage, for his maintenance and education, and on his attaining his majority to the son himself, and 440*l.* per annum to the petitioner, during the joint lives of himself and the respondent:—

Held, on appeal from the above order, by the full Court, that, where an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody; and that the fact that the original order did not give such a direction was not a ground of appeal, as the order would have been so framed if application for that purpose had been made to the Judge Ordinary at the time of making it.

That it is competent to the Judge Ordinary, under s. 5 of 22 & 23 Vict. c. 61, to direct, by the same order, property settled by an ante-nuptial or post-nuptial settlement, to be applied for the benefit of the children of the marriage and the parent.

That the amount to be allowed to the husband out of the wife's settled property is in each case a matter of discretion; and that in this case the Judge Ordinary had, in making the allowance, exercised his discretion on right principles, and in an equitable manner.

THIS was an application on behalf of the petitioner, in whose favour the Court had made a decree absolute dissolving his mar-

riage on the 13th of March, 1866, for an order directing that a portion of the income of the respondent's fortune, in which she took the first life interest, should be paid during her life for the benefit of the petitioner and the only child of the marriage.

It appeared by the petition that the respondent was, under the marriage settlement, entitled to the first life interest in 20,000*l.*; that she was, under the will of her mother, entitled to the first life interest in considerable funds, yielding an income of 549*l.* 2*s.* 4*d.*, and that the only income the petitioner had was his salary as a clerk in the Foreign Office, amounting to 260*l.* per annum.

Dec. 11, 1866. THE JUDGE ORDINARY. The petitioner in this case was married in 1858. He appeared, so far as the evidence went, to be without blame in his married life. In the year 1863 the respondent was in Italy on account of her health, and upon the petitioner going there for the purpose of bringing her home with him, she told him that she was in the family-way by the co-respondent. Until the moment of this communication the petitioner was, so far as appeared, wholly unaware and wholly unsuspicious of her criminality or even of her intimacy with the co-respondent.

He thereupon instituted this suit. The adultery was proved, and not contested, and a decree dissolving the marriage pronounced, and the petitioner now applies for the action of the Court under s. 5 of the Divorce Amendment Act (22 & 23 Vict. c. 61), and requires it so to deal with the settlements made in contemplation of the marriage and afterwards, as to adjust them to the events that have happened.

It is contended that the only sums over which the Court has any jurisdiction are those actually settled at the time of the marriage, and which produced an annual income of 909*l.* 14*s.* 6*d.*; but in regarding the respondent's pecuniary position, it must not be forgotten that there are other sums directed by the will of the respondent's mother to be settled on similar trusts to those contained in the settlement, and that they produce an annual income of 549*l.* 2*s.* 4*d.* These latter sums of money are, I think, subjected to the orders of the Court, but it is not necessary so to decide, or to have recourse to them.

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There is but one child of the marriage, George Beaumont March, born on the 16th of September, 1859. An order was long since made by this Court for the delivery of this boy to the custody of his father; but the respondent for some time refused to comply with it. On the last occasion when the matter was before the Court, it was intimated that the respondent and co-respondent had been married, and the child has now been given up. The matter is now, therefore, fit for final adjudication, and the Court is in a position to consider what provision ought to be made for the petitioner and for his child.

It was contended that, though provision had often been made for a wife out of the means of her husband, provision for the husband out of the wife's means was a novelty. The powers of this Court are of very late origin; and if in this Court they have not been exercised, it does not appear that any appeal has been made to them. But the intention of the legislature cannot be doubted. The language of the 45th section of the original Divorce Act (20 & 21 Vict. c. 85) plainly shews this intention, for by that section it was expressly provided that if an adulterous wife was entitled to any property in possession or reversion, the Court should have power to order a settlement to be made of a reasonable part of it for the benefit of the innocent party; that is, for the husband and children of the marriage. The clause, s. 5, of the Amendment Act, under which the Court is now asked to act, was only a further extension of the same principle. Now, in applying this section to the circumstances of any particular case, the first consideration will be this: what is the nature and extent of the pecuniary change operated by the wife's criminality? The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this union has been broken and the common home has been abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either

just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman. Regarding, then, the matter in this light, and with the view of restoring in a reasonable degree the pecuniary status of the parties before its abrupt termination in the respondent's adultery, the Court proceeds to such details as are necessary.

The income of the petitioner is 260*l.* a year; the income of the respondent from the resources before mentioned 1458*l.*; the joint income 1718*l.* So the matter stands during their joint lives, and the Court does not purpose to interfere with the trusts on and after the death of either of them.

The child is the first consideration. I consider that 200*l.* a year ought to be devoted to his maintenance and education, and that an order should be prepared, directing the trustees, out of the annual proceeds of the moneys settled at the time of the marriage, to pay over that sum to the petitioner for that purpose, during the joint lives of the parties and the minority of the child; the sum to be paid to the child himself on and after his coming of age. This will leave the joint income 1518*l.* I consider a further order should be drawn out directing the trustees, out of the annual proceeds of the same funds, to pay over to the petitioner the annual sum of 440*l.* during the joint lives of the petitioner and respondent. This will not effect an exact division of their joint incomes, nor is it so designed. The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. These elements are not capable of exact expression in figures, and the result must be a general one, varying according to the details of each case.

An order will therefore be drawn up in the terms I have mentioned, with liberty to each party to question the form of the

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order in its details, and if they differ, to be brought before me, and I will settle it in chambers.

April 25, 1867. On appeal from the above order to the full Court (the JUDGE ORDINARY, MELLOR, J., and PIGOTT, B.).

Sir R. P. Collier, Q.C. (*Searle* with him), for the respondent. First, that part of the order which directed 200*l.* per annum to be paid to the petitioner for the benefit of the child of the marriage should be altered by the addition of these words, "or to such other person as from time to time may be entrusted with the custody of the child." The Court, having made an order in favour of the child, is precluded by the statute from making an order in favour of the father, and, therefore, the latter part of the order is invalid. By s. 5 of 22 & 23 Vict. c. 61, the Court "may make such orders with reference to the application of the whole or a portion of the property settled by an ante-nuptial or post-nuptial settlement, either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit." The power to make an order is in the alternative, so that an order having been made for the benefit of the child, an order cannot be made for the benefit of the parent. In dealing with documents of such importance as marriage settlements, the Court should adhere to the strict letter of the statute.

Secondly, the Court ought not, in altering the settlement, to have taken into consideration the income derived by the respondent under the will of her mother.

[THE JUDGE ORDINARY. I made no order as to that fund. But in dealing with the other circumstances of the case, I took into consideration the fact that the respondent had that income.]

Thirdly, the portion allotted to the petitioner is too great, unless the Court took into consideration the conduct of the parties. This the legislature did not intend it to do. Compare ss. 32 and 45 of the Divorce Act with s. 5 of 22 & 23 Vict. c. 61.

[THE JUDGE ORDINARY. By s. 5 of the last act, the Court is to make such order as to it shall seem fit. On what principle is it to exercise that discretion?]

It should take into consideration the nature of the property only, not the conduct of the parties. When the legislature intends

that the conduct should be considered, it mentions it. There are special circumstances in favour of the husband, e. g., the probable increase of his income, which should induce the Court to give him a less proportion of the wife's income than would have been given to her out of the husband's property, if she had been the petitioner in the suit.

Hannen, for the petitioner. As to the first question, in regard to the annuity to the son, this Court, like other courts, has power to vary its orders, if circumstances hereafter should require it to do so; and the use of the word *orders* in s. 5 indicates that more than one may be required.

[THE JUDGE ORDINARY. Section 5 is so much bound up with the preceding one, by which the Court is authorized from time to time to make orders for the custody of the children, that it would seem that the order made in reference to the property for the benefit of the child should follow the order for the custody.]

The words "seem fit" indicate that the innocent party should be placed in the same position as if his wife had never left him. The allowance to the petitioner ought to be augmented; and as the decree absolute was made on the 13th of March, 1866, and the order as to the settlement was only made on the 11th of December, 1866, this last order ought to take effect from the date of the decree.

[MELLOR, J. There is nothing in s. 5 to make that a reasonable suggestion.]

The fact that the co-respondent is a foreigner, residing abroad, and that the petitioner will never get the costs in this suit, which are very heavy, against him, should have been taken into consideration in making the order.

[THE JUDGE ORDINARY. The co-respondent may come to England, and be compelled to pay the costs. It would be dangerous to take these costs into consideration.]

G. Wood appeared for the interveners, the trustees of the settlement.

THE JUDGE ORDINARY. We are agreed upon the judgment we ought to give. As to the form in which the order should be made, we think that the allowance for the child should be paid to the father

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only so long as the child remains in his custody. If an application had been made to me when the order was first drawn up to limit it in that respect, I certainly should have granted it. In allowing the amendment to be made now, the Court does not decide that such an alteration is necessary, nor that it has not power to vary from time to time any order made by it. Moreover, it wishes that it should be clearly understood that such an amendment could not be a ground for an appeal, as it is a matter that should have been dealt with at the time the original order was made. As to the construction of the 5th section of 22 & 23 Vict. c 61, we are of opinion that the Court has power to make an order respecting the whole or part of the settled property for the benefit both of the children and their parents. The words of the section are large enough to give the Court the jurisdiction, and looking at the language of the preceding acts, which are in pari materiâ, and to be read with this act, we can come to no other conclusion. It never could have been the intention of the legislature so to tie the hands of the Court, that when it had made an order in favour of the child, it could not further make one in favour of the parent, but rather that the Court should be at liberty to make orders for the benefit of the child, or parent, or both. It seems to us that there is no difficulty in this part of the case, and that we ought not to decide the point by a close, critical construction of the words, but by giving to them as full and as large an effect as in their natural sense they will admit of. As regards the amount of income to be allotted to the husband, this was a simple matter of discretion, and it was, no doubt, very difficult to arrive at a satisfactory determination as to what that exact amount should be. No two persons, except by previous concert, could probably arrive at the same conclusion on such a point. I gave the matter my full consideration at the time, and I see no reason to vary from my decision.

MELLOR, J. I am of the same opinion, and will add nothing to what the Judge Ordinary has said on the first point. As regards the construction of the 22 & 23 Vict. c. 61, s. 5, it would be taking a very narrow view of the powers given by that section, if we held that they were exhausted when an order had been made, either for the benefit of the child or for the benefit of the

parent. The words of the section do not lead to such a conclusion; indeed, it was obviously the intention of the legislature that the Court should have power to make orders for the benefit of both parties, and the word *orders*, in the plural, is consistent with that intention. If the context required that we should give a restricted effect to the word *or*, or certain circumstances shewed that such was the intention of the legislature, we should be compelled to hold that our powers were so limited; but, referring to the 20 & 21 Vict. c. 85, ss. 32 and 45, a statute in pari materiâ, I am satisfied that we have power to deal with the settlement, not only for the benefit of the child, but also of his parent. I was startled at first by the decision in *Thomas* v. *Thomas* (1), referred to by Mr. Searle, but in that case the legislature did not employ a term large enough to enable the Court to get over the difficulty raised, and I have no doubt that the decision was right. As regards the last point, I do not see that the discretion of the Court has not been properly exercised. If the marriage is dissolved by the misconduct of one of the parties, the other party should not be put in a worse condition than he would have been in if the marriage had continued, and he had had the enjoyment of the joint income. It would be an injustice to say that where the injury has been inflicted on the husband he should resume the original position he held before his marriage. Such being my view of the principles on which the distribution of the joint income should be made, I entirely agree with what was said by the Judge Ordinary (2) when the question was before him in the first instance:—"If this union has been broken, and the common home abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life." That I consider to be a sound exposition, and it is my view, of the intention of the statute. Again, he says:—"The interests of society point in the same direction. It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home

(1) 2 Sw. & Tr. 89. (2) Ante, at p. 442.

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for a guilty woman." I entirely concur in this opinion of the Judge Ordinary, and I consider his decision perfectly right. There is one other point. We were asked on behalf of Mr. March to make our order retrospective, so as to operate from the date of the decree absolute. I have great doubt whether we have any power to do this; but I am satisfied that, under the circumstances of this case, we ought not to do it, for such an order might affect the interests of other parties, who have been acting on a different impression; and although notice may have been given to the trustees, it is not sufficient to prevent their making payments in accordance with the terms of their trust. The appeal fails on all points.

PIGOTT, B. I am of the same opinion, and need add nothing on the first point. As regards the construction of the statute, if we adopt that put upon it by the respondent, we should sacrifice the spirit to the letter. The legislature clearly intended that the Court should have power to make orders for the benefit of the parents and of the children. It would be absurd that the Court, where it thought that the interests of both the parent and child ought to be considered, should be obliged to hold its hand, and only apply its powers for the benefit of one or the other. This is such a case, and in making an order in favour of both, I do not think the Court does any real violence to the act of parliament, but merely carries out the intention of the legislature. As regards the last point, the subject has been exhausted by the Judge Ordinary. No two or more persons would ever have arrived independently at the same figures in considering the distribution of the income, but I am satisfied that the discretion of the Court was well exercised.

Appeal dismissed with costs.

Attorneys for petitioner: *Pattison & Freeman.*
Proctors for respondent: *Jennings & Son.*

IN THE GOODS OF COODE. 1867
July 23.

Will of Property Abroad.

A will disposing only of property in a foreign country is not entitled to probate in this country.

G. T. COODE died domiciled in England, leaving two wills, one of which disposed of his property in England, and the other of his property in Chili. The will of English property had been admitted to probate.

July 16, 1867. *The Queen's Advocate* moved for a grant of probate of the will disposing of property in Chili to the executor therein named. He referred to *In the Goods of Tucker*. (1)

July 23, 1867. SIR J. P. WILDE. An application was made last week for probate of the will of Mrs. Coode under these circumstances. The testator made two wills, the one relating to property in Chili, and the other to property in England, and he appointed separate executors in each. The will as to property in England has been proved, and I find that the terms of the grant include all the property in England, and exclude that which is in Chili. It appears to me that to make another grant to the executor of the will relating to the property in Chili would be improper. The function of the Court is exhausted in having made a grant of probate of the English will. If any property which at the time of the testator's death was in Chili should hereafter be brought to this country, and it should become necessary to take a grant in respect of it, that may be a reason for making an application to the Court for another grant; but at present its power is, in my opinion, exhausted by the grant already made. It was intimated at the time when the application was made, that its object was simply to clothe the applicant with the character of executor, with a view to proceedings in Chili. But the object of this Court in making grants is to enable the executor or administrator to administer property in this country, and is not founded on any such conside-

(1) 3 Sw. & Tr. 585; 34 L. J. (P. M. & D.) 29.

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rations as those suggested to the Court. The grant must therefore be refused.

Proctor: *Brooks.*

July 30.

IN THE GOODS OF EARL.

Will—Foreign Probate—Grant to Foreign Executor under 20 & 21 *Vict. c.* 77, *s.* 73.

A testator at the time of his death was domiciled in New South Wales, and the Court of New South Wales granted probate of his will to A. as executrix according to the tenor. A. was not entitled to the grant as executrix according to the tenor, by the law of England; but the Court, under s. 73 of 20 & 21 Vict. c. 77, decreed administration with the will annexed to A. as the person entitled to administer under the grant of the Court of the country of domicil.

GEORGE EARL, late of Sydney, in New South Wales, died on the 17th of February, 1861, at Sydney, where he was then domiciled. He left a will in these words:—

"Mem.—This is to certify that I, George Earl, this 16th day of February, 1861, did bequeath to my wife, Jane Earl, all moneys left to me on the estate of Stephen Wildman, deceased, and also to receive all moneys left to me for the time being in bringing up and educating her family. This I give as my hand and seal.

"GEORGE × EARL,
his mark.

"Witnessed by us—
"RICHARD BALDWIN,
"EDWARD KING."

On the 20th of November, 1861, the Supreme Court of New South Wales granted probate of this testamentary paper to Jane Earl, the widow and relict of the deceased, as executrix according to the tenor. Jane Earl, who resides in New South Wales, appointed Hannah Maria Earl, of Surbiton, in the county of Surrey, spinster, her attorney to apply for probate of the will in this country.

July 23, 1867. *Dr. Tristram* moved for a grant of probate to Hannah Maria Earl as the attorney of the executrix according to

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IN THE GOODS OF EARL.

the tenor; or, if the Court could not make such a grant, for a grant of administration, with the will annexed, to her as the nominee of the legatee under the will: *In the Goods of Cosnahan.* (1)

July 30, 1867. SIR J. P. WILDE. In this case I took time to consider the question, to what extent the Court ought to follow a foreign grant of probate, the grant having been made to the applicant by the Court of the country of domicil as executrix according to the tenor. It is admitted that the terms of the will were not such as to constitute the applicant executrix according to the tenor in this country, but the Court is asked to follow the foreign grant in that respect. I have looked into the cases in which questions of this sort have arisen, and I find that for a long time considerable difficulty was felt as to the extent to which foreign grants ought to be followed. In *Larpent* v. *Sindry* (2), Sir J. Nicholl said: "The form of the grant in India is not exactly according to our practice. Here the two papers would have been proved as together containing the will of the deceased; but the Court in India, which, as the deceased died domiciled there, is the Court of competent jurisdiction, has considered them as a will and codicil, and this Court is perhaps bound to follow it. The question how far this and other Courts of Probate are to be governed by the decision of the Court of Probate where the deceased was domiciled has never been expressly determined, but I certainly should not feel inclined to depart from what has been the general practice unless a strong case of inconvenience were brought under my consideration." *In the Goods of Read* (3), the same learned Judge said: "It is not fully decided whether this Court is bound in all cases and under all circumstances to follow the grant of probate made by a court of competent jurisdiction. * * * It may often happen that but a very small part of the property is in India, where yet the party may be domiciled, and then, according to the present practice, the probate in India would still regulate the grant here. In such cases therefore the party, in order to obtain that to which he is justly entitled, and which he would naturally obtain if this Court might follow its own rules, would be compelled to go to a large

(1) Law Rep. 1 P. & D. 183. (2) 1 Hagg. Ecc. at p. 383.
(3) 1 Hagg. Ecc. at p. 476.

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expense in appealing to the Privy Council from the irregular decision of a court that has only original jurisdiction over a small part of the effects, but which by a sort of courtesy eventually regulates the whole." In the case of *In the Goods of the Countess Da Cunha* (1), the Prerogative Court, in granting administration, followed the practice of the court of the country of domicil, although it was contrary to its own; but *In the Goods of H.R.H. the Duchess d'Orleans* (2) this Court refused to do so. In *Viesca* v. *D'Aramburu* (3), Sir Herbert Jenner, after referring to the decision of a court of the country of the deceased's domicil to the effect that, pending a suit as to the will of the deceased, the property should be secured in the hands of a judicial administrator, continued: "I do not know that this order is absolutely binding on this Court; but if it be discretionary the Court would be inclined to follow the decision of the tribunal to which all the parties are subject, and which ought to have that which is incidental to the cause, namely, the care and security of the property." The same principles were acted upon *In the Goods of Isabella Stewart* (4), and *In the Goods of David Rogerson.* (5) The result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *In the Goods of H.R.H. the Duchess d'Orleans*) (2) have militated against the rule of following the foreign grant. This question was considered in *Enohin* v. *Wylie* (6), in which Lord Westbury, L.C., said: "Now, the utmost confusion must arise if, when a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and, next, of interpreting the will, and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium, and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in

(1) 1 Hagg. Ecc. 237.
(2) 1 Sw. & Tr. 253; 28 L. J. (P. M. & D.) 129. 5 Jur. N.S. 104.
(3) 2 Curt. at p. 280.
(4) 1 Curt. 904.
(5) 2 Curt. 656.
(6) 10 H. L. C. 115. 8 Jur. N.S. 897.

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the present case were followed by the courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property." I think there is strong good sense in these remarks, and the practical principle there pointed out is one that ought to be adhered to. The only question is, in what way ought the Court to act upon it? There was no power in the old ecclesiastical courts to make a grant, except in the direction indicated by the practice of those courts. This Court, however, is armed with a special power by the 73rd section of 20 & 21 Vict. c. 77. I think the Court ought to act upon that section, and to make a grant in all such cases as the present to the person who has been clothed by the court of the country of domicile with the power and duty of administering the estate, no matter who he is or on what ground he has been clothed with that power. The grant under the 73rd section will describe him as a person having that power, and thus the difficulty will be avoided of declaring that a person is executor who, according to the practice of the Court, is not executor, and of continuing a chain of executorship by persons who are executors according to the law of a foreign country, but not according to the law of this country. It is one thing to make a grant of administration and another to make a grant of probate to a person as executor, which involves many peculiar consequences. I shall make the grant of administration with the will annexed to the applicant under the 73rd section as the person entitled under the grant of the court of the country of the deceased's domicil to administer the estate.

Attorneys: *Vandercom, Law, & Payne.*

CASES

DETERMINED BY THE

COURT OF PROBATE

AND BY THE COURT FOR

DIVORCE AND MATRIMONIAL CAUSES,

FROM

MICHAELMAS TERM TO TRINITY TERM,

XXXI VICTORIA.

1867
Nov. 19.

In the Goods of De PRADEL.

Will of Married Woman—Limited Probate.

A married woman who clearly had power under a settlement to dispose of some part of her property, executed a will purporting to dispose of the whole of it. The Court, without deciding whether or not it was a valid disposition of the whole of the property, made a grant of probate, limited to such property as she had power to dispose of.

Sarah Ann d'Esteve de Pradel, the wife of Adelbert Franconi Barthelemy d'Esteve de Pradel, a domiciled Frenchman, died on the 15th of September, 1866, in London, leaving a will executed in the English form, and dated the 14th of September, 1866, purporting to dispose of all her property. By an antenuptial settlement it was stipulated that there should be a separation of goods, the husband having power to dispose of his share and the wife of her share, by will, but that the survivor should have the usufruct for life of one moiety of the estate of the deceased. The marriage took place in May, 1850, and in August,

1854, a decree of "séparation de corps" was pronounced by the Civil Tribunal of the First Instance of the Department of the Seine, and that sentence was affirmed on appeal by the Imperial Court in June, 1855. Since 1858 the deceased had resided with her mother in London. An affidavit made by a French avocat, proved that by the law of France the effect of the decree of separation was to empower Madame de Pradel to make a testamentary disposition of the whole of her property, and that the will executed by her in England according to the law of England was valid by the law of France.

Dr. Swabey moved for probate of the will to the executors, and submitted that the will was a valid disposition of the whole of the deceased's property: *Robins* v. *Dolphin.* (1)

SIR J. P. WILDE. It is unnecessary for the present purpose to enter into the question whether the deceased had power to dispose of the whole of her estate. That question will probably be raised in the Court of Construction. The only question now is in what form probate should issue, for the deceased had clearly a right to dispose of some part of her property under the power contained in the settlement. I shall follow the rule laid down in *Barnes* v. *Vincent* (2), and confine myself as much as possible to the question whether there is a valid will or not, without entering into any question which must hereafter come before the Court of construction. The will is clearly a good one, and entitled to probate, and I think the grant ought to be limited in general terms to such property as the deceased had power to dispose of. That was the course taken by Sir H. Jenner in *Legard* v. *Garland* (3), and I shall follow that precedent.

Attorneys: *Uptons, Johnson, & Uptons.*

(1) 7 H. L. C. 390. (2) 5 Moo. P. C. 201.
(3) 1 Curt. 286.

1867
Dec. 17.

BOULTON *v.* BOULTON AND ANOTHER,
KENDALL AND RICHARDS INTERVENING.

Practice—Intervention—Opposition to Will abandoned—Suit continued by Interveners—New Trial—Executor's Costs of first Trial out of Estate.

After a verdict had been found establishing a will, and a rule nisi had been granted for a new trial, the next of kin opposing it abandoned his opposition. Two other next of kin, who had appeared in the suit, but had not pleaded, were allowed to plead and adopt the proceedings up to the time of the order, in order to carry on the opposition.

Upon a verdict establishing the will being set aside on the ground that it was against evidence, and a new trial granted, the executors who had obtained the verdict were allowed to take their costs out of the estate up to the time of the rule for a new trial being made absolute.

THE defendants propounded the will of Susannah Boulton, deceased, as executors therein named. The plaintiff Joseph Boulton, the eldest son of the deceased, pleaded, in opposition to the will, undue execution, incapacity, undue influence, and fraud. Sarah Kendall and Mary Richards, two daughters of the deceased, had entered an appearance in the suit, but had not pleaded. The issues were tried before Sir J. P. Wilde by a common jury on the 27th of November, 1867, and a verdict was found for the defendants on all the issues, and the Court pronounced for the will. On the 3rd of December, 1867, a rule nisi for a new trial was granted, on the ground that the verdict was against the weight of evidence.

Dec. 10, 1867. *Dr. Deane, Q.C.*, and *Searle*, for the defendants, moved that the rule might be discharged, and the contentious proceedings discontinued, on the ground that the plaintiff was unwilling to continue them; and an affidavit of the plaintiff was read, stating that he was satisfied with the verdict, and had instructed his solicitor that he did not wish to proceed further in the matter.

Dr. Spinks, Q.C., and *Waddy*, opposed the motion. The two daughters of the deceased, Mrs. Kendall and Mrs. Richards, are desirous of proceeding with the suit, and carrying on the contest against the will.

SIR J. P. WILDE. I think they ought to be allowed to do so.

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Order, by consent, that Sarah Kendall, the wife of Thomas Kendall, and Mary Richards, wife of Joseph Richards, two of the parties cited to see proceedings, and who have entered an appearance, be allowed to plead and adopt the proceedings already had in this suit up to the present time, an appearance being first entered for the said Thomas Kendall and Joseph Richards.

Dec. 17, 1867. Cause was shewn against the rule for a new trial.

Dr. Deane, Q.C., and *Searle*, for the executors.
Dr. Spinks, Q.C., and *Waddy*, for the interveners.

THE COURT made the rule absolute, and reserved the question of the costs of the suit until after the second trial.

Searle moved for an order that the executors might be allowed their costs out of the estate up to the present time. Unless such an order is made, they run the risk in the event of the will being ultimately set aside, of having to refund the costs of the first trial, if they take them out of the estate without such an order, although they were successful on that trial.

SIR J. P. WILDE. I think the application is a reasonable one. The executors may have their costs out of the estate up to the present time.

Solicitor for plaintiff and interveners: *Crossfield.*
Solicitor for defendants: *Vann.*

1867
Dec. 20.

IN THE GOODS OF LANGFORD.

Executor, Appointment of—Substituted Executor.

An appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, *held* to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the will arose.

A. was in England at the time of the testator's death, but was absent on foreign service in her Majesty's navy when the application for probate was made, and was likely to be absent for some years, and probate was granted to B.

AYLIFFE LANGFORD, deceased, executed a will containing a clause appointing executors in the following terms:—

"I hereby constitute and appoint my son-in-law, Frederic Le M. Bedwell, paymaster in the Royal Navy, to be my executor; and in case of his absence on foreign duty, I appoint my wife, Elizabeth Langford, to be executrix to this my last will and testament."

A codicil to the will contained the following clause:—

"I appoint Mr. Robert Mitford executor with my son-in-law, F. Le M. Bedwell."

The testator died on the 12th of September, 1865. Mr. Bedwell was at that time on duty at Portsmouth, and shortly afterwards he sailed on foreign service. Affidavits were filed, shewing that at the date of this application he was on service on board her Majesty's ship *Nassau*, in the straits of Magellan, and that he would probably remain abroad for four years. Robert Mitford, the executor appointed by the codicil, had renounced.

Dr. Deane, Q.C., moved for a grant of probate to Elizabeth Langford, as the executrix substituted in the will.

SIR J. P. WILDE. I am of opinion that the intention of the testator was that his widow should be executrix in the event of Bedwell being absent on duty, and unable to act when the necessity for proving the will arose; I therefore make the grant as prayed.

Motion granted.

Solicitor: *Elderton.*

IN THE GOODS OF GRUNDY. 1868

Joint Grant of Administration de bonis non to a Next of Kin and another Person entitled in Distribution—20 & 21 *Vict. c.* 77, *s.* 73. *Jan.* 14.

A joint grant of administration de bonis non was made under s. 73 of 20 & 21 Vict. c. 77, to a next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient.

R. H. GRUNDY died on the 18th of September, 1865, intestate and a bachelor, leaving him surviving J. C. Grundy and J. L. Grundy, his brothers, and only next of kin, and Lucy Grundy, the daughter of a deceased brother, the only persons entitled in distribution to his estate and effects. On the 9th of December, 1865, administration was granted to J. C. Grundy, who died on the 19th of August, 1867, leaving part of the estate unadministered of the value of about 11,000*l*. J. L. Grundy had resided in Australia for fourteen years, and had no residence or place of business and no property in England except his interest in the intestate's estate. He had come to England on the death of J. C. Grundy, in order to obtain his share of the estate. He was unable to find sureties to the administration bond, and he was desirous that a joint grant de bonis non should be made to himself and to Lucy Grundy. Lucy Grundy was willing to accept the joint grant, in order to avoid the necessity of instituting an administration suit for the protection of her interest in the estate, which she intended to do if the sole grant were made to J. L. Grundy.

Dr. Spinks, Q.C., moved for a joint grant of administration de bonis non to J. L. Grundy and Lucy Grundy, under the 73rd section of 20 & 21 Vict. c. 77. A joint grant to a person solely entitled, and to another, is a grant to a person "other than the one who, if the act had not passed, would have been entitled." If the act had not passed, J. L. Grundy would have been the person solely entitled under 21 Hen. 8, c. 5, s. 3. *In the Goods of Browning* (1) is distinguishable from the present case. The application was for an original grant, not for a grant de bonis. No reason for

(1) 2 Sw. & Tr. 634; 31 L. J. (P. M. & D.) 161.

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the refusal to make the joint grant was given, and Sir C. Cresswell may have thought he was bound by 21 Hen. 8, c. 5, to make the grant to the widow.

SIR J. P. WILDE. I think that the Court ought, as far as it can, to use the power conferred on it by the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), for the purpose of expediting and rendering as economical as possible the administration of the estates of deceased persons. In this case both the persons, who are equally and solely interested in the unadministered estate of the deceased, are willing that there should be a grant of administration to them jointly; and the only question is, whether the Court is, by the terms of the 73rd section, precluded from giving effect to so desirable and beneficial an arrangement, and is bound to follow the strict rule laid down by the statute 21 Hen. 8, c. 5, s. 3, and to grant administration to the next of kin only? I am of opinion that the terms of the 73rd section of 20 & 21 Vict. c. 77, are wide enough to admit of its application to the present case. The grant, therefore, may go, as prayed, under that section, upon the consent of J. L. Grundy being brought into the registry.

Motion granted.

Solicitors: *Neal & Philpot.*

Applied. HODGKINS *v.* HODGKINS [1950] P. 183

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Dec. 10.

U. (FALSELY CALLED J.) *v.* J.

Nullity—Alleged Impotence of Husband—Evidence.

In a suit by a wife for nullity, on the ground of the husband's impotence, the only evidence of the alleged impotence was that of the petitioner, which was contradicted by the respondent. The evidence of the medical witnesses and the report of the inspectors was not inconsistent with either case. The Court declined to grant a decree on the unsupported testimony of the petitioner.

THIS was a petition by a wife for a decree of nullity of marriage by reason of the frigidity and impotence of the husband. The respondent filed an answer traversing the allegations in the petition, and the cause was heard before the Judge Ordinary without a jury, in camerâ, on the 27th of November, 1867.

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Dr. Spinks, Q.C., and *Searle*, for the petitioner.
Dr. Swabey for the respondent.

The petitioner and the respondent, and other witnesses, were examined.

Cur. adv. vult.

Dec. 10, 1867. THE JUDGE ORDINARY. The petitioner in this case has accepted the burthen of proving two propositions: First, that the marriage has never been consummated; and secondly, that it has failed to be so in consequence of the incurable incompetency of her husband.

I am obliged to declare that, in my opinion, she has established neither. In the first place, it is to be observed that her contention rests substantially upon her own oath alone. The physical appearances are, in the language of the medical witnesses, such that no opinion could be formed "whether for two years she had had ordinary and regular connexion with her husband or not," and that "it might have been the case" consistently with what was seen.

Such evidence does not forward the petitioner's case. Indeed, it would perhaps be more fair to say that it assists the case of the respondent, who asserts on oath that these appearances were the result of ordinary connexion. For it can hardly be denied, as the evidence in cases of this description has constantly shewn, that in general, or in the majority of cases, virginity does present outward and physical signs and appearances by which it may be recognized and affirmed. Nothing, therefore, remains but the account given by the petitioner herself, and the question is, whether it is true?

To pronounce a marriage invalid on the unsupported oath of the party who seeks to be relieved from its obligations is a serious matter, within the province of the Court, no doubt, but only to be done when the last trace of reasonable doubt as to the truth and bona fides of the case has been removed. If there be a direct conflict of testimony between the two parties who alone know the truth, as in this case, the difficulties are much increased. The scales being thus balanced by the direct testimony, the general

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circumstances of the case acquire additional weight, and the conduct and motives of the petitioner a larger significance. These general circumstances all tell against the petitioner. She saw her mother about every fortnight during the two years of her cohabitation, but she made no complaint. Yet she complained much of other matters, and was by no means satisfied with her husband's treatment. At the end of two years and a few months she left him. But the cause of her doing so was his alleged violence, for which she summoned him before the magistrates. At this period she had taken refuge with her mother, and plainly desired and intended not to return to cohabitation. But she was still silent as to that of which she now complains. Finally, the suggestion of the respondent's incompetency did not come from herself at all; but after she had been at home three weeks, her parents (so they say) heard some rumours which induced them to have the petitioner questioned, and the first statement of the present grievance was then made by the petitioner, in answer to the interrogations of her aunt. It is impossible not to entertain the suspicion that the desire to be set free from her husband proceeded from the same causes as had rendered her married life unhappy, and that the grievance she now asserts may have been simulated, as the sole means of reaching her end.

At any rate, these considerations make it difficult for the Court to arrive at the affirmative conclusion that the respondent is to be disbelieved, and the petitioner's account to be accepted as true. It remains only to notice the suggestion that the respondent, in conversation with the witness Hicks, did in fact admit his impotency. The result of this witness's testimony was, that the respondent spoke of difficulties in the consummation of the marriage, attributed them to his wife, and (as the witness says) led him, upon the whole, to imagine that connexion never took place. But the same witness admits that in the same conversation the respondent asserted his own competency in the most distinct terms, and he had a short time before distinctly denied his incompetency in the answer to the suit.

The Court could hardly conclude, from these statements, even if they had not been qualified and explained by the respondent as applying only to difficulties which existed at first, that the peti-

tioner's account is true. The respondent must be dismissed from this suit. 1867 U. v. J.

Attorneys for petitioner: *Blakeley & Beswick.*
Attorneys for respondent: *Johnson & Weatherall's.*

BARNES *v.* BARNES AND BEAUMONT. *Dec.* 17.

Custody of Infant Children pending Suit—Mother Respondent.

The Court made an order, giving the custody of two infant children—the one being of the age of between three and four years, the other of eighteen months—to the mother, the respondent in a suit for dissolution of marriage, on the ground that the mother's health was suffering from being deprived of their society, and that they were living with a stranger, and not with the father.

Cartlidge v. *Cartlidge* (2 Sw. & Tr. 567; 31 L. J. (P. M. & D.) 85), distinguished.

THE husband, William Charles Barnes, in this case charged his wife with adultery, which she in her answer denied. There were two children of the marriage, Octavia Barnes, born on the 17th of March, 1864, and William Barnes, born on the 27th of July, 1866, both of whom had been placed by the petitioner under the care of a stranger, Mrs. Pengelly, at Waltham Station, Herts, and the petitioner had refused to allow the respondent to have the custody of them. The respondent was in very depressed spirits, owing to being separated from her children, and was living with her mother, who was willing to give the children a home in her house.

Dr. Swabey, for the respondent, moved the Court to order that the custody of the children be given to the respondent pending suit. In *Cartlidge* v. *Cartlidge* (1), which would be relied on by the other side, the mother's health did not suffer, as in this case, by being separated from her child, and the child was living in the father's house, and not in the house of a stranger, as here.

Cook, contrà.

THE JUDGE ORDINARY. I think this application should be granted. It is distinguishable from the case, *Cartlidge* v. *Cart-*

(1) 2 Sw. & Tr. 567.

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lidge. (1) The children in this case are both of tender age; they are not living with their father, and it is clear that the mother's health has suffered from being deprived of their society. No doubt the father is, at common law, entitled to the custody of the children. But here they are not under his roof, as in *Cartlidge* v. *Cartlidge* (1); he does not enjoy the solace of their society, and that case clearly excepted the state of things now before the Court. The order must go as prayed—the father to have access to the children once a fortnight.

Solicitor for petitioner: *Chorley.*
Solicitor for respondent: *J. Lott.*

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Jan. 14.

PITT *v.* PITT.

Dissolution of Marriage — Practice — Adultery with Person Unknown — Leave to Proceed without Co-Respondent—20 & 21 *Vict. c.* 85, *s.* 28—*Rules* 4, 5, *and* 6.

When a petition charges adultery with a person unknown, and names no adulterer, it is necessary to obtain the leave of the Court to proceed without making a co-respondent.

THIS was a husband's petition for dissolution of marriage. The petition alleged that the petitioner left England on the 17th of September, 1855, and remained abroad until the month of June, 1858; that during his absence from England, the respondent at some place or places in England committed adultery with some person or persons unknown to the petitioner; and that on the 3rd of July, 1856, she gave birth to a child of which the petitioner was not the father. The respondent did not appear.

Searle moved for directions as to the mode of trial.

[THE JUDGE ORDINARY. There is no co-respondent, and the petitioner has not obtained the leave of the Court to proceed without making a co-respondent.]

It is not necessary to obtain the leave of the Court to dispense with a co-respondent where his name is not mentioned

(1) 2 Sw. & Tr. 567; 31 L. J. (P. M. & D.) 85.

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and it is alleged that he is unknown, although no doubt it has hitherto been the practice to do so. The words "alleged adulterer" in the 28th section of 20 & 21 Vict. c. 85, and in the 4th Rule, imply that the adulterer is known, and that his name is mentioned in the petition. The section does not apply to a case like this, where the only evidence of adultery is the birth of a child, and the non-access of the petitioner. Where a petition charges adultery with a co-respondent who is named, and with other persons unknown, it is not the practice to apply for leave to proceed without making the unknown persons co-respondents. In this case the petitioner is poor, and his affidavit in support of the petition sets out all the facts, and shews that he does not know the co-respondent, and cannot ascertain who he is. Perhaps the Court will now make the order allowing him to proceed without a co-respondent, if it thinks such an order necessary, in order to save the expense of another application.

THE JUDGE ORDINARY. I think that where a petition alleges adultery, there is an "alleged adulterer" within the meaning of the 28th section of 20 & 21 Vict. c. 85, and therefore that it is necessary to apply for leave to proceed without making a co-respondent, although the alleged adulterer may be unknown. I intend to adhere to the practice of not dispensing with a co-respondent on the affidavit of the petitioner alone. But under the special circumstances of this case, I will now make an order that the petitioner may proceed without making a co-respondent; and I will give directions as to the mode of trial.

Attorneys: *Neal & Philpot.*

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March 3.

SCHIRA *v.* SCHIRA & SAMPAJO.

Petition for Dissolution—Wife's Answer alleging Desertion, and praying a Judicial Separation—Withdrawal of Petition—Terms—Co-respondent.

Where a husband petitions for a dissolution of marriage on the ground of his wife's adultery, and she in her answer prays for a judicial separation on the ground of desertion, the Court will not at the husband's instance (the wife opposing) terminate the suit by dismissing the petition.

This was a husband's petition for dissolution of marriage, on the ground of the respondent's adultery.

The respondent answered, denying the adultery, and charging the petitioner with having deserted her, since 1839, and prayed for a judicial separation on the ground of such desertion. The co-respondent had pleaded to the jurisdiction of the Court. The Court had made orders for payment of alimony pendente lite, and of the respondent's costs, none of which orders had been complied with.

Gibbon, for the petitioner, moved for leave to dismiss the petition, as the petitioner could not afford to proceed with the suit.

Searle, for the co-respondent assented, subject to the payment of his costs.

Inderwick, for the respondent, objected. The respondent, by her answer, charges desertion, and prays for a judicial separation, which she is anxious and entitled to obtain on proof of her answer.

The Judge Ordinary. The suit must be kept alive to enable the respondent to enforce the orders for costs and other claims, which have not been complied with. The respondent also is clearly entitled to prove the charge alleged in her answer of desertion, to enable her to obtain the relief she prays. It is for the advantage of the petitioner that she should be allowed to do this, for if she were not, she would be entitled to commence a suit for desertion, and put him to the expense of another petition and answer. The petitioner should give notice to the respondent that he does not intend to proceed with the charge on the petition. The co-

respondent must be dismissed, and the petitioner must pay his costs.

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Order accordingly.

Solicitor for petitioner: *C. Champin.*
Solicitors for respondent: *Belpage & Middleton.*
Solicitor for co-respondent: *Barron.*

WOOD *v.* WOOD AND STANGER.

March 13.

Bankruptcy—Orders to pay Damages into Court, and to pay Costs to Petitioner—Effect of Adjudication of Bankruptcy, and Order of Discharge upon such Orders—24 & 25 Vict. c. 134, *s.* 149—*Costs of Trial when jury are discharged without verdict.*

In a suit for dissolution of marriage the co-respondent was ordered to pay into Court the damages which had been recovered against him by the petitioner, and also to pay the petitioner's costs. After service of these orders, but before the costs were taxed, the co-respondent was adjudicated a bankrupt on his own petition, and afterwards obtained an order of discharge. Upon an application for an attachment for disobedience to these orders, it was held that the petitioner, being entitled to enforce payment against the co-respondent by process of contempt, was a creditor within the 149th section of the Bankruptcy Act, 1861, both as to the damages and costs. That such damages and costs were debts, proveable under the bankruptcy, and therefore that the order of discharge covered them, and the co-respondent could not be attached for their non-payment.

A jury being unable to agree, were discharged without giving a verdict. On a second trial the petitioner obtained a verdict, and a decree was pronounced, condemning the co-respondent in costs, but the Court refused to include in these costs the costs of the first trial.

THIS was a petition by a husband for dissolution of marriage, and claiming damages. The respondent and the co-respondent filed answers traversing the charge of adultery, and the cause was tried before the Judge Ordinary by a special jury in July, 1866. The jury were unable to agree to a verdict, and were discharged. The cause was again tried by the Judge Ordinary, and a special jury on the 6th, 7th, and 8th of March, 1867, when a verdict was found for the petitioner, and the damages were assessed at 3000*l.* The Judge Ordinary thereupon pronounced a decree nisi, dissolving the marriage, and condemned the co-respondent in the costs. The decree was made absolute on the 5th of November, 1867.

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Nov. 12. *Dr. Tristram*, for the petitioner, moved (in chambers) that the order for the payment of costs should include the costs of the first trial.

Searle, for the co-respondent, opposed the motion.

THE JUDGE ORDINARY. It was not the fault of the co-respondent that the jury were unable to agree, and I think he ought not to pay the costs of the trial in which the petitioner did not succeed in proving his case.

On the 12th of November, 1867, it was ordered that the co-respondent should, within three weeks of the service of the order, pay the 3000*l.* damages into the Registry, and the order was served on the co-respondent on the 15th of November, 1867.

On the 3rd of December, 1867, the co-respondent was, on his own petition, adjudicated a bankrupt by the Court of Bankruptcy at Birmingham.

The petitioner's costs having been taxed at 719*l.* 11*s.* 7*d.*, it was ordered, on the 28th of January, 1868, that the co-respondent should within one week from the service of the order, pay that sum to the petitioner or his solicitor, together with 1*l.* 18*s.* 2*d.*, the costs incidental to the order. On the 31st of January, 1868, this order was served on the co-respondent.

On the 4th of February, 1868, the co-respondent obtained his final order of discharge from the Court of Bankruptcy at Birmingham.

Feb. 18. *Dr. Spinks, Q.C.*, obtained a rule nisi for an attachment against the co-respondent for disobedience to the orders of the 12th of November and the 28th of January.

March 3. *Sargood* and *Searle* shewed cause against the rule. As soon as the decree condemning the bankrupt in costs was pronounced such costs were proveable under the bankruptcy, although they had not then been taxed, and the petitioner was a creditor in respect of them. He was a creditor in respect of the damages as soon as the order was made that they should be paid in to the Registry. He was entitled to enforce payment of both those sums of money by process of contempt, and therefore to prove them under the bankruptcy, (24 & 25 Vict. c. 134), s. 149. These sums being

proveable as debts under the bankruptcy, the 161st, 162nd, and 165th sections of the act relieve him from them, and from the effects of any process issuing out of the Court for their non-payment. The Court will not make an order which would be inoperative, and if an attachment were made the bankrupt would be entitled to an immediate release. They referred to the 12 & 13 Vict. c. 106, s. 181, *Dickens* v. *Dickens* (1), *Ex parte Skinner* (2), *Ex parte Crabtree* (3), *Ex parte Griffiths.* (4)

Dr. Spinks, Q.C., and *C. Russell*, in support of the rule. Damages are not a debt due to the petitioner inasmuch as their application is in the discretion of the Court, and the Court may direct them to be so applied for the benefit of the respondent, or of the children of the marriage, that no part of them shall become the property of the petitioner (20 & 21 Vict. c. 85, s. 33): *Narracott* v. *Narracott* (5); *Billingay* v. *Billingay.* (6) The petitioner therefore is not a creditor as to the damages. There is no creditor until the Court has directed to whom they are to be paid. The costs were not payable until a week after the service of the order of the 31st of January, namely, on the 7th of February, and the order of discharge being dated the 4th of February does not cover them. They cited *Phillips* v. *Poland.* (7)

Sargood, in reply. The petitioner must be entitled to enforce payment of the damages by process of contempt, or he can have no right to make the application for an attachment. If the damages had been proved by him as a debt, and a dividend had been paid in respect of them, such dividend would not have been paid to the petitioner. He would have been allowed to prove them, but the official assignee would have paid them into the Registry: *Lees* v. *Newton.* (8)

THE JUDGE ORDINARY. The question here raised is, whether the bankruptcy of the co-respondent has, or has not, had the effect of discharging him from the liability to pay the damages and costs awarded against him in this suit.

The verdict passed on the 8th of March, 1867. But a verdict

(1) 2 Sw. & Tr. 645.
(2) 7 Law Times (N.S.) 136.
(3) 33 L. J. (Bkr.) 33.
(4) 33 L. J. (Bkr.) 44.
(5) 3 Sw. & Tr. 408.
(6) 35 L. J. (P. & D.) 84.
(7) Law Rep. 1 C. P. 204.
(8) Law Rep. 1 C. P. 658.

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creates no debt. On the 5th of November, 1867, the decree nisi, which had been made on the 8th of March, 1867, was made absolute. By the terms of that decree, the co-respondent was condemned in the costs of the suit. On the 12th of November an order was made by this Court, on the application of the petitioner, that the co-respondent should, within three weeks from the service of the order, pay into the registry 3000*l.*, the amount of the damages. This order was served on the 15th of November. On the 3rd of December, the co-respondent was, on his own petition, adjudicated a bankrupt. It thus appears that at the time of the adjudication, the co-respondent had been ordered to pay both damages and costs, though, as respects the damages, the furthest time allowed for their payment had not expired; and in respect of costs, no taxation had been had upon which any order to pay a definite sum could be made.

It is beyond argument that those creditors only can prove under the bankruptcy who are creditors at the date of the adjudication. This has been clearly decided in *Phillips* v. *Poland* (1), and in other cases.

Two points are made. First, that the petitioner was not a creditor on the 3rd of December; and next, that he has never at any time been a creditor in respect of the damages. The 149th section of the act of 1861, defines a creditor for this purpose as "a person entitled to enforce against the bankrupt payment of any money, costs, or expenses, by process of contempt." I am of opinion that the petitioner was on the 3rd of December a person so "entitled," both as regards the damages and the costs, within the meaning of this section.

And, first, as to the damages. This Court had, at his instance and application, ordered the co-respondent to pay them; and although the Court had further indicated that they should be paid into Court instead of into his own hand, the petitioner was still "entitled to enforce the payment thereof by process of contempt." Indeed, this is the very right he is by the present motion attempting to exercise, and, but for the bankruptcy proceedings, would undoubtedly be "entitled to enforce."

The case of *Lees* v. *Newton* (2), has a direct bearing on this part

(1) Law Rep. 1 C. P. 204. (2) Law Rep. 1 C. P. 658.

of the case. It was there held that an order of the Court of Chancery to pay a sum of money into Court, created a "debt"—and that the bankrupt was, after his discharge, entitled to be set free from an attachment issued to enforce it. It is argued, however, that the three weeks after the service of the order had not expired at the date of the adjudication; and consequently no process of contempt for disobedience of the order could have been issued at that date. This is true. But the language of the section points, I think, to the character of the obligation and the means by which it may be enforced, not to the time at which it must be discharged. Debitum in præsenti solvendum in futuro. The order of this Court to pay, created, I conceive, a proveable debt—and this debt stood in the same position with other ordinary debts existing at the date of the adjudication and payable at a date subsequent—which, by the provisions of the bankruptcy acts, are proveable with a rebate of interest if necessary.

Next, as to the costs. The words at the close of the section, "subject to such ascertaining of the amount as may be properly had by taxation or otherwise"—imply that the application of the section was not intended to be confined to cases in which the costs had been taxed, and a definite sum ordered to be paid before the adjudication.

For these reasons I think the damages and costs were proveable debts. If so, no doubt, the bankrupt's discharge covers them; and if so, it would be monstrous for this Court to issue an attachment to enforce their payment.

It only remains to say one word on the practical effect of thus deciding. It is said that the bankruptcy has been resorted to on purpose to escape from the penalties of the bankrupt's misdeeds. This is very probable. But it must be borne in mind that the legislature has visited the offence of adultery with no penalty, not even a pecuniary one, and that the damages recovered in a divorce suit are assessed as a money compensation to the petitioner; although, by a singular anomaly, the Court is afterwards empowered to divert the money, when recovered, into other channels.

To whatever extent the offender is able to make this money payment, his pecuniary means ought not to be allowed to escape. But once grant that his means are insufficient, and it becomes

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contrary to the spirit both of the Divorce Acts and the Bankruptcy Acts that he should be subjected to an imprisonment which may satisfy the purposes of punishment or retribution, but which is likely to extinguish rather than advance his means of paying the debt.

The rule for an attachment must, therefore, be discharged, but without costs.

Attorney for petitioner: *J. Needham.*
Attorneys for co-respondent: *Taylor, Hoare, & Taylor.*

June 18.

BURLS *v.* BURLS.

Lost Will—Proof of Contents—Executrix condemned in Defendant's Costs for Negligence.

Where a will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had read the will, the parol evidence must be placed side by side with the draft, and out of them the Court will extract the contents of the will to be proved.

Where the substance of a will had been propounded, and, in most particulars, established by an executrix, through whose negligence the original will had been lost, the Court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the original will in solemn form.

THE testator, John Burls, died in October, 1866, having duly executed a holograph will in January, 1866. This will had been deposited by the testator at his warehouse in the City, and a few days after his death his daughter, Louisa Burls, one of the plaintiffs, went to his warehouse to look over his papers, and having found this will, placed it along with a will of 1864 and other testamentary papers in a bag, which she took home with her, but on arriving there she found the will was missing, and supposed it had dropped out of the bag whilst she was changing cabs, which she did when driving home. On discovering the loss, she made every search and inquiry for the missing will without avail.

The plaintiffs, Emily and Louisa Burls, propounded a paper in the testator's handwriting, supposed to be a draft of the lost will, alleging that it was a correct copy of the will, excepting that it

did not contain the appointment of executrixes, and that it contained two sentences which were not in the original will. The defendants, being also a daughter and a grandson of the deceased, pleaded that the draft was not a correct copy of the will.

The case was heard before Sir J. P. Wilde without a jury. The two attesting witnesses proved the execution of the will, and its existence after the death of the testator. Louisa Burls stated the circumstances under which the will was lost, and gave evidence of its contents, as well as two other witnesses, all of whom had read it over. There was some slight discrepancy in their accounts of its contents.

Dr. Deane, Q.C., and *Dr. Tristram*, for the plaintiffs.

Dr. Spinks, Q.C., and *Inderwick*, for the defendants.

Cur. adv. vult.

June 11, 1867. SIR J. P. WILDE. In this case it was proposed to supply by parol testimony the contents of a lost will. The due execution of the will, and its existence after the death of the deceased, were proved beyond all question. It was read by several persons after the death of the deceased, and was afterwards lost by accident. The questions at the hearing were, first, whether there was sufficient evidence from which the contents of the document could be ascertained; and, secondly, if so, what those contents were. The case presents no feature of fraud or unfair dealing. The evidence was open to no real suspicion; and the case resolves itself simply into a question of the accuracy of that evidence. In addition to the testimony of the persons who read the will, and whose statements as to its contents in the main agreed with one another, there was produced a document in the handwriting of the deceased, which, upon the face of it, appears to be a draft of a will; but there was no proof, except from the similarity of its contents, that it was a draft of the will in question. From these materials the Court has to ascertain, if it can, the real contents of the will. Since the case of *Brown* v. *Brown* (1) referred to in the case of *Wharram* v. *Wharram* (2), I take it as established, that in ascertaining the contents of a will

(1) 8 E. & B. 886. 4 Jur. N.S. 163.

(2) 3 Sw. & Tr. at p. 303; 33 L. J. (P. & D.) at p. 77. 10 Jur. N.S. 499.

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not brought before it, the Court must, so far as regards the sources from which the testimony is sought, proceed in the same way as if it were dealing with any other paper, the contents of which are to be proved by secondary evidence. It is not necessary for me to repeat what was said in *Wharram* v. *Wharram* (1), for this case is free from the circumstances of suspicion which were there present. But with regard to the character of the evidence, I may observe that there are no degrees of secondary evidence, and that in this case the Court must take parol evidence side by side with the supposed draft, and out of them extract, as best it may, the contents of the will. Now, the witnesses agree in all the substantial matters contained in the chief part of the draft. The difference between them is not so much as to the positive recollection of particular things, but that one recollects more than another. There is no contradiction in the testimony of the witnesses, but the memories of some of them are defective. Without going minutely into the question, I may say that I am satisfied that the draft does contain the substance of the will, save that in the draft there is no appointment of executors; and according to the evidence of all the witnesses, except Louisa Burls, the will did appoint the deceased's widow and two of his daughters executrixes. I shall pronounce for the will as contained in the draft, with the addition I have named in reference to the executors.

Dr. Spinks asked that the defendant should have her costs out of the estate, or for Louisa Burls to be condemned in these costs, on the ground that the litigation had been caused solely through her negligence.

Dr. Tristram consented to the defendant's costs coming out of the estate.

SIR J. P. WILDE. I shall not order the defendant's costs to be paid out of the estate, but I will consider the propriety of condemning Louisa Burls in these costs.

June 18, 1867. SIR J. P. WILDE. An application was made that the costs of the defendants should be paid out of the estate (which was refused at the time), or that Louisa Burls, one of the plaintiffs,

(1) 3 Sw. & Tr. 301; 33 L. J. (P. & D.) 75.

should be condemned in those costs. The plaintiffs, Louisa and Emily Burls, as executrixes, propounded a certain paper as containing the will of the testator, with two exceptions, first, that it contained some words which were not in the original will; and, secondly, that it did not contain the appointment of executors. The defendant pleaded that the paper propounded was not a correct copy of the will. At the hearing the Court was satisfied that the will was duly executed, and allowed probate to go of its contents. But it also decided that the plaintiffs' version of the contents was not correct, for that the will did contain the words of the draft which they stated were not in the will, and that it likewise appointed the deceased's widow one of the executrixes. The plaintiffs, therefore, partly failed, though in the main they were successful. Under these circumstances the defendants ask that Louisa Burls should be condemned in these costs, on the ground that she caused the whole litigation by negligently losing the will. It was urged in answer that she had been successful in this suit, and therefore ought not to be condemned in costs. Now I apprehend that the Court has a discretion in the matter of costs. In *West* v. *Wilby* (1), Sir John Nicholl said, "It is to be remembered that the party may involve herself in costs, although the question of right may be in her favour." And, again, in *Headington* v. *Holloway* (2), it is said, "In respect of costs, though the general rule is that where a party propounds a paper loco executoris and establishes it, he is entitled to his costs; yet, adverting to the imprudent and unwise conduct of Mr. Holloway, and that the matter of costs is more peculiarly left to the discretion of the Court, ... I do not think that his costs, occasioned as they are by his own delay in producing the paper, ought to fall on the residue." These authorities satisfy me that in following the rule of right I shall be also conforming to previous decisions, and I think that rule of right is this: if Louisa Burls had not lost the will, she would have been entitled, as one of the executors, to have proved it in solemn form: it is owing to her negligence that anything more than that has become necessary, and therefore the defendants, who were certainly entitled to come before the Court, and have the contents of the will properly proved, and who

(1) 3 Phillim. at p. 377. (2) 3 Hagg. Ecc. 282.

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were partly successful, ought to have their costs paid by Louisa Burls. But inasmuch as if, acting with prudence and caution, she had not lost the will, she would have been entitled to prove it in solemn form, and deduct her costs out of the estate, I think she ought to be allowed to take out of the estate such costs as the registrar may think she would, under such circumstances, have fairly incurred.

Solicitors for plaintiffs: *Gray & Berry.*
Solicitors for defendants: *Parker, Rooke, & Parker.*

April 28.

HUNT AND GOTBED *v.* ANDERSON.

Discovery of Documents—Practice—20 & 21 *Vict.* c. 77, s. 36.

The Court of Probate possesses powers as extensive as the Court of Chancery and the superior courts of common law to compel a discovery, by virtue of the 36th section of the 20 & 21 Vict. c. 77, such powers being "auxiliary to the trial of questions of fact by a jury before the Court itself."

The Court of Probate will exercise its power of compelling a discovery in cases where a discovery would be granted by the Court of Chancery, in order that parties may not be compelled to resort to the Court of Chancery for assistance in the prosecution of a suit in the Court of Probate.

THE plaintiffs, William Hunt and William Gotbed, propounded as executors the will, dated the 16th of March, 1867, of William Anderson, late of Torquay, in Devonshire, who died on the 12th of November, 1867. The defendant, John Anderson, the only son and next of kin of the deceased, pleaded that the will was not duly executed, that the deceased was not of sound mind, and that the will was procured by the undue influence of the plaintiffs and of Hepzibah Clark. These issues were ordered to be tried by a special jury.

Feb. 4. *Dr. Spinks, Q.C.*, and *Searle*, for the defendant, moved for a rule to shew cause why the plaintiffs should not file a further affidavit of scripts and documents in this cause, and setting forth whether they have in their possession or under their control any letters written in the years 1865, 1866, and 1867, relating to the management of the affairs of the deceased in this cause, and to the exclusion of his son, the defendant, from any control over his

affairs, and to the preparation and execution of the alleged will propounded by the plaintiffs, by H. Clark in the name of the deceased, and signed by the deceased to W. Hunt; and any such letters written by the said H. Clark in her own name, but purporting to act as the agent of the deceased to W. Hunt; and any such letters written by the said W. Hunt, or by any person on his behalf, to the deceased and to the said H. Clark; and any such letters which passed during the years 1865, 1866, and 1867, between the said H. Clark and W. Gotbed, and between the said W. Hunt and W. Gotbed; and why they should not further state whether any letters, such as are above described, and other scripts, were found in the repositories of the deceased after his death; and whether any such letters and scripts as are above described have been destroyed since the death of the said deceased, and, if they have been destroyed, when and by whose direction they were destroyed; and why they should not set out the substance and effect of the letters and scripts (if any) so destroyed; and, further, why the said plaintiffs should not produce to the said defendant, or file in the Registry for his inspection, any such letters and scripts as are now in their possession or under their control.

An affidavit of the defendant was filed in support of the application, stating in substance that the plaintiffs and H. Clark, who was the deceased's housekeeper, had gradually acquired great influence over him during the last few years of his life, and that during the two years preceding his death they had obtained the entire control and management of his property, and that H. Clark was in the habit of writing letters for him in her own name and in his name, and there was reason to believe that a correspondence had passed between her and Hunt relating to the affairs of the deceased, and that immediately after the death of the deceased the defendant saw a number of envelopes of letters, the addresses on which were in the handwriting of W. Hunt, in the possession of H. Clark, and that H. Clark had stated that the letters were all safe, but declined to say why they had been removed. The plaintiffs had filed affidavits stating that no papers or correspondence relating to the testamentary affairs of the deceased other than the papers filed with the affidavit of scripts, were in their possession.

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The application was founded on the 36th section of the 20 & 21 Vict. c. 77.

Rule nisi granted.

Feb. 18. *Lopes* shewed cause against the rule. The Court has no power to grant such a discovery as is sought, and if the defendant is entitled to it he must apply to the Court of Chancery: *Peacock* v. *Lowe* (1); *Fuller* v. *Ingram*. (2) The Court of Probate cannot exercise all the powers conferred on the common law courts by the Common Law Procedure Acts, because it was not in existence when those acts were passed, and the Probate Acts only confer certain powers of the common law courts upon it which are specified in the Probate Acts, and the power of granting a discovery

(1) *Peacock and Peake* v. *Lowe and Others*.—The plaintiffs propounded a will of Maurice Peter Moore, dated the 18th of August, 1866. The defendants, who were the daughter and next of kin of the deceased and her husband, and the brother of the deceased, who was interested under a former will, pleaded that the will was not duly executed, and incapacity. A rule was granted at the instance of the defendants, calling upon the plaintiffs to shew cause why they should not file an affidavit setting forth what testamentary scripts or documents written or signed by the deceased, and relating to the matter in dispute in this cause, were in their possession, or within their knowledge or control, and especially whether they had in their possession or under their control cheques, drafts, &c., signed by the deceased between certain dates, or letters, or copies of letters, or drafts, or copies of or memoranda relating to testamentary scripts, and further setting forth what documents written or signed by the deceased were found in his depositories after his death, and why such documents should not be produced to the defendants, or deposited in the Registry for their inspection.

Dr. Spinks, Q.C., and *Searle*, shewed cause against the rule.

Dr. Deane, Q.C., and *Inderwick*, supported it.

July 2, 1867. SIR J. P. WILDE. The question has been raised whether the Court has power to order such a discovery as is sought by the defendants. It is not necessary to decide that question. There is at present no practice in this Court by which such a discovery can be obtained, and it is competent to either party to file a bill for a discovery in a court of equity, as was done in *Fuller* v. *Ingram*. I shall therefore make no order as to that part of the motion which relates to a discovery of all documents in the possession or within the knowledge of the plaintiffs in the deceased's handwriting. But there was a practice in the ecclesiastical courts by which the production of testamentary scripts, or scripts alleged to be testamentary and material to the inquiry, might be enforced, and in accordance with that practice I shall order the plaintiffs to file a further affidavit of scripts.

Attorneys for plaintiffs: *Taylor, Hoare, & Taylor.*

Attorney for defendants: *A. De L. Smith.*

(2) 28 L. J. (Ch.) 432.

is not so specified. But even if this Court does possess the power of a common law court for the purpose of granting a discovery, this is not a case in which that power would be exercised by a common law court, for the affidavits are insufficient as to the existence of any documents material to the issue, and as to their being in the custody or under the control of the plaintiffs. He referred to 17 & 18 Vict. c. 125, s. 50; Day's Common Law Procedure Acts; *Bray* v. *Finch.* (1)

[SIR J. P. WILDE referred to the latter part of the 36th section of 20 & 21 Vict. c. 77, "*and generally for all purposes of or auxiliary to the trial of questions of fact by a jury before the Court itself*, and in respect of new trials thereof, and also for all purposes in relation to or consequential upon the direction of issues, *the Court of Probate shall have the same jurisdiction, powers, and authority in all respects as belong to any superior Court of common law or to any judge thereof, or to the High Court of Chancery, or any judge thereof, for the like purposes.*"]

The section applies only to the powers of the Court, at and during the trial, and ought not to be construed as conferring on the Court all the powers of the courts of Chancery and common law in matters preliminary to the trial.

Dr. Spinks, Q.C., and *Searle*, for the defendants, were not called upon.

SIR J. P. WILDE. I am satisfied that this rule ought to be made absolute. It is clear that if this Court has the same powers as the Court of Chancery with regard to discovery, it has power to make the order sought by the defendants. It has been very well urged, that the decisions as to discovery in the common law courts are much narrower than those in the Court of Chancery, and do not perhaps justify this application, but I proceed upon the 36th section of the 20 & 21 Vict. c. 77. It is certainly remarkable that although this Court has been established for ten years, no application appears to have been made until last summer, in the case of *Peacock* v. *Lowe* (2), to enforce the discovery of papers, and even then no reference was made to this s. 36.

After the death of a testator, his papers fall into the hands

(1) 1 H. & N. 468. (2) Ante (note 1), p. 478.

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sometimes of an executor, sometimes of the next of kin or other relation, and they may be of the highest importance to both sides, yet practically, the persons who happen to have possession of them at the time of the death, have been used to keep possession of them until the trial, and have availed themselves of them for their own purposes without giving the other side an opportunity of examining them. Up to the present time, there has been no practice in this Court by which this extremely inconvenient and unjust state of things can be remedied. In *Peacock* v. *Lowe* (1), the Court not having had its attention called to the 36th section, acted upon the existing practice, and refused the application. The parties were therefore obliged to resort to the Court of Chancery and file a bill for discovery, and the litigation has been going on in that court up to the present time. An application of a similar kind being now made, and the 36th section being brought to the notice of the Court, the question arises, what construction is to be put on that section? The words of the section are no doubt very general, and like all general words somewhat ambiguous:—"Generally for all purposes of or auxiliary to the trial of questions of fact by a jury before the Court itself, . . . the Court of Probate shall have the same jurisdiction, powers, and authority in all respects as belong to any superior court of common law or to any judge thereof, or to the High Court of Chancery, or to any judge thereof for the like purposes."

It is an evil of great magnitude that the parties to a suit should not have at hand in the Court in which it is pending all the proper means and appliances for bringing the questions in dispute to an issue, and for bringing all the evidence bearing upon them before the Court. It causes a great increase of expense, and it may be in some cases a denial of justice, to compel parties to resort to another court in order effectually to carry on the suit in this. The Court is therefore extremely indisposed to put a narrow construction on the section, and to say that in cases like the present the parties must resort to Chancery in order to obtain a discovery. I think that the words of the section are wide enough to enable the Court to grant a discovery. The discovery not only of testamentary documents, but also of correspondence connected with the

(1) Ante (note 1), p. 478.

(y) See 2 W. R. 205.

making of the will, and of letters written by the testator on matters of business and other matters, may have the strongest possible bearing on the question of the testator's sanity at the date of the will. The enforcing of a discovery of documents of these kinds is clearly a purpose "auxiliary to the trial of the question of fact" of the testator's sanity. In many cases, indeed, the question of fact cannot be fairly tried without such assistance. The section gives the Court a large latitude, for it confers upon it the powers not only of a court of common law but also of a court of chancery. I shall exercise that power by ordering the plaintiffs to produce the correspondence as prayed, or to file an affidavit that it is not in their possession or under their control. The rule will be made absolute in the terms of the motion.

April 28. *Lopes* moved that the defendant might be ordered to file an affidavit as to correspondence which had passed between himself and the deceased relating to the deceased's affairs for several years prior to his death, and also as to such parts of the correspondence, or copies of it, as were in his possession, and also as to whether any part of such correspondence had been destroyed, and if so, when and by whom it was destroyed.

Searle, for the defendant.

The Court made the order.

Solicitors for plaintiffs: *Surr & Gribble.*

Solicitors for defendant: *Reed, Phelps, & Sidgwick.*

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March 7.

Undue Influence.

6 C.L.D. 64

Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of a testator, will constitute undue influence, though no force is either used or threatened.

THIS was a testamentary suit in which the plaintiff, Ann Hall, propounded the will of her deceased husband, John Hall. The defendant, William Hall, the brother of the deceased, pleaded that the will was obtained by the undue influence of the plaintiff.

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Issue was joined on this plea, and the cause was tried on the 6th and 7th of March, 1868, before Sir J. P. Wilde, by a special jury. The only plea being undue influence, the defendant opened the case. The deceased was a farmer and land valuer near Nottingham, and by the will in question he left the whole of his property, of the value of between 15,000*l.* and 20,000*l.*, to his wife. The evidence called on the part of the defendant was to the effect that he had made this will solely in consequence of the violence and the threats of the plaintiff, and for the sake of peace and quietness; and that it did not express his real testamentary intentions. The evidence in support of the will was to the effect that it was the voluntary act of the deceased, and that so far from the plaintiff having used violence and threats, she had not even used persuasion to induce him to make it.

Sir R. Collier, Q.C., A. Staveley Hill, Q.C., and *Weightman*, were for the plaintiff.

Dr. Spinks, Q.C., and *Dr. Tristram*, for the defendant.

SIR J. P. WILDE, in summing up, gave the following direction to the jury on the question of undue influence:—To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's.

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His Lordship went on to say that in this case the question was one of credibility, for, according to the evidence on the one side, the plaintiff had procured the will by violence, threats, and intimidation, whilst, according to the evidence of the plaintiff and her witnesses, she had not even resorted to persuasion.

The jury found that the plea of undue influence was proved.

The Court pronounced against the will and condemned the plaintiff in costs.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Rawle.*

Attorney for defendant: *Bird.*

Considered. WINNAN *v.* WINNAN. [1948] 2 All E.R. 862.

FINNEY *v.* FINNEY.

April 28.

Estoppel—Petition for Judicial Separation charging Cruelty—Subsequent Petition for Dissolution charging the same Cruelty coupled with Adultery.

A wife petitioned for judicial separation on the ground of cruelty, and the charges of cruelty being traversed by the husband, the Court found that they were not proved and dismissed the petition:—

Held, that she was estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution.

SUSAN MARY FINNEY prayed for a dissolution of her marriage with Edward Hamilton Finney on the ground of adultery coupled with cruelty.

The respondent, in his answer, traversed the charges of adultery, and, as to the charges of cruelty, alleged that prior to the filing of the petition, to wit, on the 12th of January, 1867, the petitioner filed a petition for judicial separation on the ground of cruelty, and that the allegations of cruelty contained in the said petition were the same as those set out in the present petition. That on the 2nd of February, 1867, the respondent filed an answer traversing the said allegations, and that the issue raised by the said petition and answer was tried by the Judge Ordinary, by oral evidence, on the 13th and 14th of November, 1867, and that, after hearing the evidence of the petitioner and the respondent, and of other witnesses, and after hearing counsel for the petitioner and the respondent respectively, the Judge Ordinary, by a decree of the

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26th of November, 1867, found that the respondent was not guilty of cruelty as alleged in the said petition, and dismissed the said petition; and the respondent submitted that he was not bound to make any further answer to the allegations of cruelty contained in the present petition.

To this answer the petitioner demurred.

Dr. Spinks, Q.C., and *Dr. Swabey*, for the petitioner, supported the demurrer. The doctrine of estoppel does not apply, the last suit being for judicial separation, and the present for dissolution. It is instituted alio intuitu, and *Evans* v. *Evans* (1) is an authority in point. *Barrs* v. *Jackson* (2), and the *Duchess of Kingston's Case* (3), were also cited.

Searle, for the respondent, was not called upon.

THE JUDGE ORDINARY. In all the cases cited the question raised was, either to what extent one court is to be bound by the judgment of another court, or how far a court is to give effect to a decision on certain facts pronounced in some other suit of a wholly different nature. But the questions of fact raised in this case are precisely the same as those which were inquired into and determined in a previous suit in this very court. In both suits the husband is charged with the same matrimonial offence, that of cruelty. That issue having been tried, and found in the husband's favour in the former suit, the wife now seeks to have it tried over again, and it is argued that she is entitled to reiterate those identical charges, because she has tacked on to them a charge of adultery. I think that cannot be allowed. According to the practice of every court, after a matter has once been put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all courts it would be treated as an estoppel. There is abundant reason why, in this court especially, the same questions should not be tried over again. In most cases the trials are at the cost of the husband, and the Court ought not to allow a wife to persecute a husband as she

(1) 1 Sw. & Tr. 173. (2) 1 Y. & C. 585; 1 Phill. 582, on appeal.
(3) 2 Sm. L. C. 6th ed. 679.

could do if she were allowed to repeat charges which have once been found against her. The allegations of cruelty must be struck out of the petition.

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Leave was given to amend the petition by striking out the prayer for dissolution, and substituting a prayer for judicial separation on the ground of adultery.

Attorneys for petitioner: *Bischoff, Coxe, & Bompas.*
Attorneys for respondent: *Sutcliffe & Summers.*

CHURCHILL *v.* CHURCHILL AND ABBOTT.

Jan. 25.

Practice—Mistake in Spelling of Name—Service of Citation and Process—Attachment.

After a decree for dissolution of marriage with costs against the co-respondent, and an order for the payment of such costs, an attachment was issued against the co-respondent for their non-payment. The person who had been cited and served with the process and notices as the co-respondent throughout the suit, moved to set aside the attachment on the ground that his surname was misspelt and one of his christian names omitted in the citation, and process, and notices:—

Held, that the co-respondent having taken no step to set the mistake right in the course of the suit, could not at the last moment take advantage of it to invalidate the proceedings, and that the order for an attachment must stand.

THE petitioner had obtained a decree for the dissolution of his marriage with costs against the co-respondent, and an attachment had been issued against the co-respondent for non-payment of the taxed costs. The writ had been suspended on the application of Mr. William Braine Abbot, a proctor in Doctors' Commons, upon the ground that all the proceedings in the suit had been served on him in the name of William Abbott.

Day, for the petitioner, read an affidavit of the solicitor's clerk who had served the process and the notices on the co-respondent, to the effect that the co-respondent had said when he was served with the citation that he had expected it for some time, and he should be glad when the case was over; that when he was asked for the costs, he had said he should place the matter in the hands

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of his solicitor; and that he never denied that he was the right person to be served.

Bayford, for Mr. W. B. Abbot. A defendant who is served with process in a wrong name is entitled to take advantage of the irregularity, and to have the proceedings set aside as far as they affect him. He cited *Cotton* v. *Cotton and Kinnis* (1); *Kisch* v. *Kisch* (2); *Powell* v. *Burgh* (3); *Johnson* v. *Richardson* (4); *Johnson* v. *Smallwood* (5); *Griffin* v. *Gray* (6); *Hinton* v. *Stevens*. (7)

THE JUDGE ORDINARY. The substance of this application is to set aside an order that a writ of attachment should be issued on the ground that there is a mistake in the name of the person upon whom it is intended to be executed, the name in the writ being the same as the name which has appeared throughout the suit as that of the co-respondent. The Court would be ready, if the petitioner desired it, to amend the proceedings by substituting the right name of the co-respondent; but the petitioner for obvious reasons prefers to take the attachment with the name as it now stands. The question is, whether the Court ought to set aside the order it has made on that ground. I am clearly of opinion that it ought not. The days have gone by, I hope never to return, in which trumpery mistakes in the names of parties were held to invalidate the proceedings in courts of justice. But even in those days, I believe it was never held that a man was entitled to stand by and allow proceedings to go on against him to judgment, and then to ask the Court to interfere on his behalf on the ground that his name was mis-spelt. Two classes of cases have been cited: one, in which this Court has been asked to set right a blunder which has been made in the spelling of a name during the proceedings; and the other, in which courts of common law have been asked to set aside proceedings in consequence of the mis-spelling of a name. But none of those cases are applicable to the present, for the reason that Mr. Abbot stood by throughout the proceedings, as if he were the right person, and took no

(1) 32 L. J. (P. M. & A.) 31.
(2) 33 L. J. (P. M. & A.) 115.
(3) 2 Lee, 517.
(4) 2 Lee, at p. 518.
(5) 2 Dowl. 588.
(6) 5 Dowl. 331.
(7) 4 Dowl. 283.

step in the matter until the very last moment. I am clearly of opinion that the order for an attachment must stand; that the stop which the Court put upon it for a day or two must be withdrawn; and that the co-respondent must pay the petitioner the costs of this application.

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Solicitor for petitioner: *J. Michael.*

BIRT *v.* BOUTINEZ (FALSELY CALLED BIRT).

May 27.

Scotch Marriage—Belgian Domicile—Re-marriage in Belgium—Belgian Divorce of Belgian Marriage.

A., an Englishwoman, married B., a Belgian, in Scotland. They afterwards went through a second ceremony of marriage in Belgium. After a cohabitation in Belgium, a competent Belgian tribunal pronounced a decree of divorce, on the ground of mutual consent, purporting to dissolve the Belgian marriage, but not purporting to affect the Scotch marriage. A. afterwards married C. in England, during the lifetime of B.:—

The Court *held*, that the Scotch marriage between A. and B. was a valid and subsisting marriage, and, on the petition of C., declared his marriage with A. in B.'s lifetime null and void.

Quære. Would the English matrimonial court have recognized the Belgian decree of divorce by mutual consent, if it had purported to dissolve the Scotch marriage?

PETITION by William Jacob Birt for a declaration of the nullity of a de facto marriage which he had contracted with Emily Burdett, otherwise Emily Boutinez, at the church of St. George the Martyr, Southwark, on the 26th of September, 1857. The respondent did not appear. The cause was heard by the Judge Ordinary, without a jury, on the 28th of April, 1868. The facts of the case as set forth in the petition, and as proved by the evidence, are stated in the judgment.

Dr. Spinks, Q.C., and *Houston*, for the petitioner.

The cases of *Sinclair* v. *Sinclair* (1), and *Simonin* v. *Mallac* (2), were cited in argument.

Cur. adv. vult.

(1) 1 Hagg. Const. R. 294.
(2) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.

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THE JUDGE ORDINARY. The petitioner in this suit was married to the respondent in London on the 26th of September, 1857. He has instituted these proceedings to annul that marriage, upon the ground that the respondent was at the time of its celebration the wife of another man.

A previous valid marriage between the respondent and Eugene Adolphe Boutinez was no doubt contracted at Gretna Green, in Scotland, on the 31st of December, 1845. And there is equally no doubt that Eugene Adolphe Boutinez was alive on the 26th of September, 1857, and still is. The case of the petitioner would, therefore, seem to be established. But some further matters have been very fittingly brought to the notice of the Court, for discussion and consideration, though they do not, in my judgment, affect the petitioner's claim to a decree.

It appears that the respondent and Monsieur Boutinez, after the Scotch marriage, went to reside in Belgium, where he had his domicile. And while there domiciled, for some reason not explained to the Court, the parties went through a second ceremony of marriage, conducted according to the law of that country, at Kain, in the kingdom of Belgium, on the 24th of August, 1846. The previous marriage in Scotland being, in the eye of the law of this country, a valid and subsisting contract of matrimony, this second ceremony cannot be held, in this court, to have created any new status in the parties.

On the 9th of January, 1857, the Belgian court, having jurisdiction in such matters, declared that "in the name of law there is dissolution of the marriage which took place on the 24th of August, 1846, at Kain, and this, on the mutual consent of the two parties."

It does not appear from the evidence submitted to this Court, that the Scotch marriage was in any way brought in question before the Belgian court, or even known to that tribunal. Whether, if it had been brought forward, and application made to dissolve it by mutual consent, the Belgian tribunal would have held itself competent to that act, this Court has no means of knowing. Had such a divorce been pronounced, it would have been necessary to consider how far the law of this country would adopt and act upon the dissolution of a valid Scotch marriage by a foreign court; and that upon a ground unknown to the law of this country, the mutual

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consent of the parties. Other questions spoken to in the argument would also have required consideration. It would have been proper to consider the effect of those restrictions upon re-marriage which form part of the same law of divorce under which the mutual consent of the parties sufficed to release them from their existing obligations.

But it is quite needless to pursue these matters. The Scotch marriage has never been impugned, no decree of any court has affected to vacate it; and the marriage which the respondent sought to contract with the petitioner in 1857 must therefore be pronounced null and void.

Attorney for petitioner: *J. F. Isaacson.*

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May 5.

Desertion—Maintenance of Wife during Separation—Reasonable Cause of Desertion.

A husband who withdraws from cohabitation with his wife may be guilty of the offence of "desertion" within the meaning of s. 16 of the Divorce Act (20 & 21 Vict. c. 85), although he continues to support her.

Desertion "without cause" means "without reasonable cause." Such reasonable cause is not necessarily a distinct matrimonial offence on which a decree of judicial separation or dissolution could be founded; but it must be grave and weighty. Mere frailty of temper and habits which are distasteful to a husband, are not reasonable ground for depriving a wife of the protection of his home and society.

WIFE'S petition for judicial separation; the husband in his answer denied the charge, and alleged that he was justified in withdrawing from cohabitation by the petitioner's conduct. The cause was tried by the Judge Ordinary without a jury.

Price, Q.C., and *Staveley Hill*, for the petitioner. The respondent appeared in person.

Cur. adv. vult.

THE JUDGE ORDINARY. This is a suit promoted by the wife against the husband for a judicial separation, on the ground of

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his "desertion without cause for two years and upwards." Mr. Yeatman made the acquaintance of his wife shortly before December, 1852, when he induced her to elope with him from her relations to Gretna Green, where they were married. She was about eighteen years of age, a German by birth, but brought up in England by some German relations, with whom she was residing at the time when the marriage took place. This union afforded little happiness from the first. Mr. Yeatman complains of his wife's temper and conduct, she of his neglect and harshness; and in the result, after a cohabitation of something less than four years, Mr. Yeatman took her to Germany, avowedly for a stay of some weeks together; but after a few days he left her there with a relation, stating that he had to return to England on business. This was in the month of August, 1856. From that time to the present he has never cohabited with her, and this is the desertion of which his wife complains.

It is plain, on the testimony of both parties, that Mrs. Yeatman did not acquiesce in this separation, and on many occasions entreated her husband to live with her. It is also plain that at the time when he thus left her, Mr. Yeatman had made up his mind that he would not live with her any more. It was therefore a permanent abandonment of cohabitation on the husband's part, without and against the consent of the wife.

But he continued to support her, and the first contention of Mr. Yeatman is, that this circumstance is of paramount importance, and precludes his conduct from amounting to "desertion" within the meaning of section 16 of the Divorce Act. The word "desertion" is found several times in that act, sometimes coupled with the words "without cause," and sometimes with the words "without reasonable excuse." But in all parts of the act I think the word itself must be held to mean and define the same thing.

It is true that in section 21, providing for the granting of orders protecting the wife's property, it is necessary to shew, in addition to "desertion," that "the wife is maintaining herself by her own industry or property." But this rather proves that the word "desertion" alone was intended to carry no such qualification with it, than the reverse, and certainly does not aid the argument, that in other parts of the act, where no such qualification is added,

the word "desertion" must be construed to mean abandonment without pecuniary means. Nor could the Court, without express words for the purpose, so interpret the meaning of the legislature. A wife is entitled to her husband's society, and the protection of his name and home, in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute, or mitigated by a liberal provision for her support; but if the cohabitation is put an end to against the consent of the wife, and without the intention of renewing it, the matrimonial offence of "desertion" is in my judgment complete.

The remaining question is whether Mr. Yeatman had "cause," which I think must mean "reasonable cause," for thus deserting his wife?

Now, it must be borne in mind that, according to the matrimonial law of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence, such as adultery or cruelty, upon which the Court could found a decree of judicial separation. And that in all other cases, no matter what her conduct, she can always claim a decree enforcing cohabitation. Save, then, in cases where some such a matrimonial offence has been committed, the law does not justify and support the husband in deserting and living apart from his wife. And it may be considered hardly consistent with this to hold that any desertion can be "reasonable" which cannot be justified by proof of such offence, or, in other words, that the law should at the same time hold the desertion of the husband to have been reasonable, and yet, if asked by the wife, decree that her husband must take her back again. The inconsistency, however, is perhaps more apparent than real. For the legislature may have thought it right, in creating the new matrimonial offence of "desertion," to subject the remedy for it to the condition that the conduct of the party complaining should not have led to the result complained of; and if it should have done so, to deny all remedy for the desertion, without affirming that the parties were legally justified in living apart. However this may be, the inconsistency, if it exists, is the work of the legislature, as interpreted by the full Court of Divorce. For in the case of *Haswell* v. *Haswell* and

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Sanderson (1) it was decided that conduct falling short of a matrimonial offence sufficient to found a decree for judicial separation was still sufficient "cause" to bar all remedy to a wife whom her husband had deserted. By this decision I am bound to shape my course.

Assuming, then, this decision to be correct, it remains to be seen whether the "cause" alleged in this case was sufficient. The charges Mr. Yeatman brings against his wife, as his reasons for deserting her, resolve themselves into an impeachment of her general conduct throughout the time that he lived with her. One charge, indeed, of a distinct and very different character from the rest, he makes against her. But this she distinctly denies; and upon consideration I cannot hold that it is proved. I allude to the supposed admission by her that she had been unchaste before marriage. Passing, then, to her general conduct, I find Mr. Yeatman complaining, in the main, of her violence to himself (this he afterwards explained to mean violence of temper), her insulting conduct to other people, her dirty habits, and her cruelty to her child. With regard to her violence of temper, there seems to have been considerable ground for his complaint. She speaks in a letter of being "self-willed, wild, and thoughtless;" and then again of her "unhappy temper," which she excuses by adding, "but I was but a child and without experience." When asked to explain this, she says in her evidence that her husband was "neglectful and cruel," "that he stayed away from home a great deal and out till twelve or one at night;" "by this," she says, "my temper became irritated." As to insulting other people, Mr. Yeatman does not detail any occasion so as to enable the Court to judge, and Dr. Arthur Farre, whom he names in connection with this charge, was not called to corroborate him. As to her dirty habits, there is evidence from a woman with whom she lodged, and that woman's servant, in support of this charge; but the witnesses seemed to speak with a strong bias against her, and led the Court to believe that they were indulging in exaggeration. It is also to be remarked, that Mrs. Yeatman has never been examined about this herself, no allusion being made to it in the long cross-examination which Mr. Yeatman himself administered. Lastly, as

(1) 1 Sw. & Tr. p. 502; 29 L. J. (P. M. & A.) 21.

regards the cruelty to her child, it is admitted by Mr. Yeatman that she was extravagantly fond of it at times, and although both he and the witnesses before alluded to speak of her beating it, Mr. Yeatman himself admits that the child exhibited no marks or bruises, and she most indignantly repudiates ever having struck it in her life.

It is a most significant fact, in considering the evidence on all these charges, that no member of Mr. Yeatman's family, to many of whom she was known, was called to condemn Mrs. Yeatman's conduct. If her outbursts of temper had been habitually such that Mr. Yeatman could not have been expected to bear with them, his sister, with whom she stayed for some time in the year 1855, at Holbeach, would surely have experienced them. The same remark applies to her alleged want of cleanliness in her linen and dress. In like manner, though she lived at Dr. Dempsey's for above six months, and although many witnesses were produced, as to her conduct while there (in the cross-suit which Mr. Yeatman instituted for divorce) no witness was called in this suit to prove either passionate temper or uncleanly habits while residing in Dr. Dempsey's establishment.

Upon a review of this evidence, and of the mutual conduct of both parties, the Court cannot find reasonable ground for the separation which Mr. Yeatman has persistently enforced upon his young wife. The difficulty of her temper, and such of her habits as were distasteful to him, might reasonably have been expected to disappear with judicious conduct on his part in the course of continued cohabitation.

It would be of evil example if this Court should hold that mere frailty of temper, unless shewn in some marked and intolerable excesses, was reasonable ground to justify a man in throwing a young wife upon the world, without the protection of his home and society. A woman so placed is open to many temptations. If she fail to resist them, the husband who has already quitted her will not be slow to take advantage of her fall, making his own desertion a first step towards a claim for divorce. True, she may at once insist on returning to him, and may obtain a decree obliging him, if within the jurisdiction of this Court, to receive her again, and thus terminate the desertion. But

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angry feelings, the promptings of pride, or the advice of others may intervene. The wife may not be inclined to protect herself by forcing her society upon a husband bent upon casting her off; and if the result is criminality, the original fault still lies at the husband's door. If submission is the part of the wife, protection is no less that of the husband, and he is bound to extend that protection to his wife, even against herself and her own impulses, so far as the fences, the restraints, and the inducements of conjugal cohabitation may serve to that end. It was with no other view than this, I conceive, that the legislature in section 30 of the Act gave the Court power to withhold a divorce from the husband after his wife's adultery, if he should be shewn to have "wilfully separated from or deserted his wife without reasonable excuse." And whatever is held to constitute "desertion without reasonable excuse" for this purpose, must I think be also held "desertion without cause" in the section upon which the present suit is founded.

For this reason, then, if for no other, the "cause" should be grave and weighty which, in the judgment of the Court, should deprive a deserted wife of her remedy for that desertion, and her right to set it up as a bar to a divorce for adultery at her husband's suit. I am therefore of opinion that the offence of "desertion without cause for two years and upwards" is established.

The remedy prescribed by the legislature is but a very imperfect one—judicial separation will but give a legal sanction to the actual separation between these parties which has long existed. But it will effect two objects which I presume Mrs. Yeatman desires—an allowance from her husband regulated by this Court, and a decree affirming her husband's "desertion," which may protect her from being harassed by further proceedings at his hands, for he has already sued her no less than three times—first in the year 1858, for nullity of marriage on the ground that she was insane, and had been so during all the four years he had lived with her; next in 1862, for adultery with some person in Germany; and lastly in a cross-suit commenced about the same time as the present, for adultery while at Dr. Dempsey's. To both these charges of adultery Mrs. Yeatman pleaded his desertion in addition

to denying the adultery; but the proof of adultery failing in both suits, no decree on the desertion has hitherto been made.

She has now instituted a suit herself for the purpose of obtaining such a decree, and in my judgment she is entitled to it.

Attorney for petitioner: *S. Edwards.*
Attorneys for respondent: *Sharp & Foe.*

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June 2.

Settlements—22 & 23 *Vict. c.* 61, *s.* 5—*No living issue of marriage—Trustees.*

Held, by the Judge Ordinary, and Montague Smith, J. (Pigott, B., dissenting), that the Court has no power to make an order with reference to settled property under the 5th section of the 22 & 23 Vict. c. 61, unless there are children of the marriage living at the time of the divorce.

The trustee of a marriage settlement cannot be heard in support of an application to alter the settlement, but he may be heard in opposition to such an application.

ON the 13th of November, 1866, a decree absolute was pronounced dissolving the marriage between the petitioner and the respondent, on the ground of the respondent's adultery. On the 6th of July, 1867, the petitioner filed a petition under the 5th section of the 22 & 23 Vict. c. 61, praying that he might be permitted to prove the existence of certain settlements set forth in the petition, and the truth of other allegations therein contained, and for such order with reference to the application of the whole or a portion of the settled property for the benefit of the petitioner as to the Court should seem fit. The first paragraph of the petition stated that there was issue of the marriage one child only, who died in the month of November, 1864. A motion was thereupon made by Dr. Deane, Q.C., and Inderwick, for the respondent, and by Dr. Spinks, Q.C., and Searle, for Major Moore, one of the trustees of the settlement, intervening, that the petition might be dismissed on the authority of *Thomas* v. *Thomas* (1), and *Bird* v. *Bird.* (2)

(1) 2 Sw. & Tr. 89; 29 L. J. (P. & M.) 160, n.
(2) Law Rep. 1 P. & D. 231.

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Dr. Swabey and Ernst Browning were for the petitioner. On the authority of the cases cited, the Judge Ordinary dismissed the petition. The petitioner appealed from the order dismissing the petition, to the full Court, and the case came on for argument on the 24th of April, 1868. (1) The question was, whether the Court has power to deal with marriage settlements where there is no issue of the marriage living at the time of the decree dissolving the marriage. (2)

Dr. Swabey (*Ernst Browning* with him), for the appellant. *Thomas* v. *Thomas* (3) is not a direct decision upon an application to make an order under the section, and therefore it is not binding on the Court. The question was not argued, and it was unnecessary to decide it, as the applicant was able to attain her object by another form of order. There are two questions: first, whether the statute applies where there has never been issue of the marriage; secondly, whether it applies where there has been issue, but there is none surviving at the date of the decree. As to the first question:—the statute is a remedial one, and should be liberally construed; there can be no valid reason for confining its operation to cases where there are children, and the terms of the first part of the section are wide enough to include all married persons. It was probably the intention of the legislature to give the Court power to alter settlements in favour of the innocent party to a marriage, for the section directs the Court to take into consideration an alteration for the benefit of the parents as well as of the children. Why should a guilty spouse derive a benefit from settlements if there are no children which he or she would not derive if there were children? As to the second point:—the parties to a marriage are parents as soon as a child is born, and they do not cease to be parents when the child dies.

(1) Before the Judge Ordinary, Pigott, B., and Montague Smith, J.

(2) The 5th section of the 22 & 23 Vict. c. 61, is as follows:—"The Court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements, made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

(3) 2 Sw. & Tr. 89; 29 L. J. (P. M. & A.) 160, n.

Dr. Tristram appeared for trustees of the settlement, who supported the appellant's prayer for an alteration in his favour.

The Court held that the trustees of a settlement could not be heard in support of an application to alter such settlement, although they might be heard in support of the settlement.

Dr. Deane, Q.C., and *Inderwick*, for the respondent, and *Dr. Spinks, Q.C.*, and *Searle*, for the intervener, a trustee who objected to any alteration of the settlement. The intention of the legislature must be gathered from the words they have used, and the use of the word "parents" in the latter part of the section, instead of the repetition of the words "parties whose marriage is the subject of the decree," occurring in the former part, is a strong indication of their intention. The word "parents" would have been inappropriate in the first part of the section, because it includes ante-nuptial settlements. The legislature may very reasonably have intended to limit the extraordinary powers conferred by this section to cases where there are living children of the marriage, as the benefit of the children is manifestly the object of the section.

They cited *Bell* v. *Bell and Anglesey* (1); *March* v. *March and Palumbo.* (2)

Dr. Swabey, in reply. The Court has power to alter the settlement for the benefit of the parents only.

Cur. adv. vult.

MONTAGUE SMITH, J. In this case the appellant obtained a decree against the respondent for the dissolution of their marriage on the ground of the respondent's (the wife's) adultery. The marriage took place in 1860. There was one child of the marriage, who died in 1864. The decree dissolving the marriage was made on the 13th of November, 1866, and thereupon, on the 6th of July, 1867, the appellant filed a petition praying the Court to inquire into the existence of an ante-nuptial settlement, and to make such order with reference to the application of the settled property for the benefit of the appellant as the Court should think

(1) 1 Sw. & Tr. 565; 29 L. J. (P. M. & A.) 159.
(2) Law Rep. 1 P. & D. 440.

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fit. The Judge Ordinary dismissed the petition on the ground that the Court had no jurisdiction to interfere with the settlement for the benefit of the appellant; and I am of opinion the decision of the Judge Ordinary is right, and ought to be affirmed.

The question turns on the proper construction of the 5th clause of the 22 & 23 Vict. c. 61, viz., whether the appellant was a "parent" entitled to the benefit of the provision contained in that clause. The clause has already received judicial construction. The full Court has decided that the clause gives no power to deal with settlements in cases where no child of the marriage has been born: *Thomas* v. *Thomas* (1); and the Judge Ordinary was of opinion in *Bird* v. *Bird* (2), that the reason of the judgment in *Thomas* v. *Thomas* (1) applied to a case in which there had been a child who had died before the dissolution of the marriage, and that he had no jurisdiction to make an order in such a case. These decisions, if they do not conclusively bind the Court, at least afford strong authority against the appellant's construction, and I should not feel at liberty to dissent from them unless I had a clear opinion that they were wrong; but I own that my opinion is entirely in accordance with these decisions.

The jurisdiction given by the legislature to this Court to interfere with the settlements made by the parties themselves in a case like the present is a strong power to confer. Such a jurisdiction did not previously belong to any court: see *Hodgens* v. *Hodgens* (3), and the same case before Lord Chancellor Sugden in Ireland (4); and the Court must be careful not to overstep the power created and conferred upon it by the legislature. It appears to me from the language used that the governing object of the legislature was to enable the Court to make a provision for the children of the marriage, and only as subsidiary to that object to make provision for their parents. The clause, after enabling the Court to inquire into the settlements, empowers it to make orders with reference to the application of the property settled "for the benefit of the children of the marriage or of their respective parents." It is

(1) 2 Sw. & Tr. 89; 29 L. J. (P. M. & A.) 160, n.

(2) Law Rep. 1 P. & D. 231.

(3) 4 Cl. & Fin. 323.

(4) Lloyd and Gould's Rep. temp. Sugden, at p. 328.

plain that if there are no children of the marriage there can be no parents, so that I cannot entertain a doubt that *Thomas* v. *Thomas* (1) was rightly decided. I think also there can be no parent within the meaning of these words unless there are living children of the marriage to be provided for. The language is, "children of the marriage or their parents." Not only the words themselves, but the collocation of them, convey to my mind a clear indication that the legislature advisedly used the word "parents" in its ordinary sense, and did not intend this power to arise unless there were living children for whom provision might and ought to be made. If there are such children, then and then only the Court has power to make orders for them or their parents. It might in some cases be prudent and convenient, where a home is broken up, that provision should be made for the children, not only directly by giving a benefit to them, but also indirectly by giving a benefit to their parents. If it had been intended to confer a power to make a provision for husbands and wives independently of the existence of children, I should have expected to find other and more apt words to express that intention. In the 45th clause of 20 & 21 Vict. c. 85, which enables the Court to deal with the property of a wife guilty of adultery, the words are "for the benefit of the innocent party and of the children of the marriage." These words are well adapted to express the intention of the legislature, when it was meant to make provision for the husband independent of the children, and one would have expected to have found in the statute now in question language descriptive of the parties to the marriage, as such, if there had been an intention to alter settlements in their favour, apart from the existence of children.

It is not within the province of the Court to consider whether it is fitting or not that the Court should have the power contended for by the appellant. The question is, whether the legislature has conferred it. I come to the conclusion that it has not, and that this appeal ought to be dismissed.

PIGOTT, B. This was an appeal to the full Court from an order of the Judge Ordinary dismissing a petition of the appellant, who

(1) 2 Sw. & Tr. 89; 29 L. J. (P. M. & A.) 160, n.

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prayed the Court to make an order with reference to the application of the whole or a portion of the property settled on the marriage of the petitioner.

The facts of the case were these:—The appellant and the respondent were married on the 6th of June, 1860. There was issue of the marriage one child, who died aged about two years. A final decree dissolving this marriage, for the wife's adultery with one Lowe, was pronounced in November, 1866. In the following February Mrs. Corrance married Lowe, the adulterer. The settled property consisted of several sums of money, the property of the wife, and also of a sum of 7,000*l.*, covenanted to be paid to trustees by the father of the appellant. The parties to the marriage took life interests respectively in the sums in certain events, and the question before the Court is whether, on the true construction of the 5th section of the 22 & 23 Vict. c. 61, the Judge Ordinary, after the final decree dissolving the marriage, has any jurisdiction over this settled property. I am of opinion that he has.

The question depends on the meaning of the legislature, as it can be collected from the language employed. The enactment in question was passed by way of supplement to the provision in the first Divorce Act (1), s. 45. That provision did not apply to settled property. But as to other than settled property it gave the judge power, in cases of divorce for the wife's adultery, to deal with such property for the benefit of the innocent party, (i.e., the husband), and of the children of the marriage, or either of them. So that if this property were not settled there would be jurisdiction to act for the petitioner's benefit within that section. But it is necessary to resort to s. 5 of 22 & 23 Vict. c. 61, under which alone settled property can be dealt with. The section includes all cases where decrees for nullity of marriage or dissolution of marriage have been pronounced; it gives the Court power to inquire into the existence of all settlements, whether ante-nuptial or post-nuptial, made on the parties whose marriage is the subject of the decree, and it then authorizes the Court to make such orders with reference to the application of the whole or a portion of the property settled *either for the benefit of the children*

(1) 20 & 21 Vict. c. 85.

of the marriage or of their respective parents, as to the Court shall seem fit.

The whole difficulty turns on the meaning of the word "parents" as here used. Does it necessarily mean parents of a child or of children still living, or may it be read as descriptive of persons who have once acquired the *status* of parents by having had a child or children born of a marriage the subject of the decree? I think the language is quite capable of the latter meaning, and that the sentence may be read as if the words were "for the benefit of the children of the marriage or of the parents of such children—i.e., children of the marriage." This reading would not necessitate the continued existence of the children at the date of the decree, it does no violence to the language of the legislature, and in my judgment is in furtherance of the manifest intention to benefit the parties to the marriage as well as the children, and quite independently the one of the other.

It may be difficult to account for the distinction in the section between cases where there are settlements but no children born of the marriage, and those where children are born. I do not consider myself at liberty to speculate on the cause of this distinction. It may be that it was unintentional, but it cannot be because the benefit of the children alone was considered of importance as argued by Dr. Deane. Judging à priori, it might have been expected that the legislature would have given power to the judge who dissolves a contract of marriage to deal also with those other contracts which were made as incidental to the marriage contract; and much more after the legislation in the 45th section might it be expected that in all cases, if in any, the settlements of the married parties should be dealt with. But be that as it may, I feel bound by the use of the word "parents" to hold that jurisdiction is not given where no child of the marriage has been born and where, therefore, neither of the parties could in any sense or at any time be designated as "parents." But, on the other hand, I think the fullest meaning should be given to the actual language employed, and that I am not exceeding it in holding that it is here used relatively to the preceding words "children of the marriage," and consequently that where the status of a parent has been once acquired with reference to that marriage the benefit of that status

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continues, so as to bring the person within the intention expressed in this section. The Judge Ordinary, in *Bird* v. *Bird* (1), thought and decided that this case must follow the decision in *Thomas* v. *Thomas* (2), but for the reasons I have given, I feel bound to come to a different conclusion. The petitioner's position is somewhat analogous to that of a tenancy by the curtesy which is not lost by the death of the issue.

The reason and justice of the case seem to me to be in accordance with this view, and I think it highly desirable that the adulterous party to a marriage should be amenable to the jurisdiction of the Court to the fullest extent to which the legislature can be fairly taken to have expressed its intention to make him or her so liable.

THE JUDGE ORDINARY. I should have been glad if this Court could, consistently with the language of the statute, have come to the conclusion that the intention of the legislature in this matter was to confer power to deal with marriage settlements in all cases of divorce, whether there had been children or not. It is probable that such was the intention, but the statute under consideration, by describing the parties to the suit as "parents" in the operative part of the section, appears to me to preclude this Court from giving effect to that intention, if it existed. All orders of this Court to be made under the authority of this section must (so says the act) be "either for the benefit of the children of the marriage or of their respective parents." The word "parents" cannot be applied to parties who have had no children without a violence to the language used, so great as to exceed the limits of judicial exposition, and so decided the full Court in the case of *Thomas* v. *Thomas*. (2) All the members of the Court on this occasion concur in the propriety of that decision, but it is now argued that, although the legislature thus restricted the powers of this Court to cases in which children had been born of the marriage, yet that the restriction is satisfied if a child has once existed—in other words, that the expression "children of the marriage and their parents" is applicable to children long since dead, of whom the parties to

(1) Law Rep. 1 P. & D. 231.
(2) 2 Sw. & Tr. 89; 29 L. J. (P. M. & A.) 160, n.

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the suit may be properly called the "parents." There are some insuperable objections, I think, to this conclusion. First, the language is not appropriate to carry it. The word "parent" is a word of relation. It expresses the relation between father or mother and child, and it is therefore properly applicable so long, and so long only, as that relation exists. If there is no "child" there is no "parent." If there has been a child there have been "parents." With the death of the child the relation ceased, and the appellation of "parent," though it may, in the looseness of common talk, continue to be attributed to those who once stood in that relation, ceases to be properly applicable. The question is not widely different from that which might be raised on the use of the expressions "husband" and "wife," as to which I conceive that after the death of a wife a man can no longer properly be called husband, or vice versâ; though in common parlance such terms might be, and are not unfrequently, used. But, secondly, the language runs "for the benefit of the children" or "their parents." The "parents" here spoken of are "parents" of the children in whose favour orders of the Court may be made, consequently of living children. The word "their" inseparably connects the word "parents" with such children.

So far by way of verbal criticism. But there is a consideration which affects my mind much more strongly. I conceive that the Court should at least forbear to do violence, however slight, to the language of the legislature if by so doing they induce an unreasonable conclusion. It seems to me that it would be to the last degree unreasonable to imagine that the legislature intended the marriage settlements in cases of divorce to be subject to the orders of this Court if the parties had ever had a child, but not so subject if the marriage had been childless. I can trace no connection between the incident of a child having once existed and the propriety of interfering with the marriage settlements of a divorced couple after that child's death. If there are children living at the time of the divorce, it may be that the legislature, for their sake, has created a power of reopening the settlements which it has thought right to deny to parties who are childless; and, once reopened, it may have thought it right not to restrict the new destination of the settlement funds wholly to the children, but to

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give the Court a discretion in favour of their "parents." But when the children are dead and no order can be made in their favour, they cease to afford a reason for dealing with settlements at all, and the case of the married parties becomes no different from what it would have been if a child had never existed. I have tried in vain to imagine or discover a possible hypothesis upon which such a distinction could have been intended, and the failure to find it is the main reason which influences my judgment to reject the distinction.

Dr. Deane applied for the respondent's costs.

Dr. Spinks applied for the costs of the trustee.

Dr. Swabey opposed the application. The respondent has separate property.

THE JUDGE ORDINARY. We are all of opinion that this was a fair question for argument, and therefore we make no order as to costs.

Appeal dismissed; no order as to costs.

Attorney for appellant: *J. W. Flavell.*

Attorney for respondent: *A. D. Smith.*

Attorney for intervener: *Taylor, Hoare, & Taylor.*

BARNES *v.* BARNES AND GRIMWADE, THE QUEEN'S PROCTOR INTERVENING. 1867 *Nov.* 22.

*Collusion—Payment of Allowance to Wife in lieu of Alimony pendente lite—Suppression of material Facts—Costs—*23 & 24 *Vict. c.* 144, *s.* 7.

The fact that a husband makes his wife an allowance in lieu of alimony whilst a divorce suit is pending is not of itself proof of collusion. But evidence that a husband had several interviews with his wife both before and after he presented a petition for dissolution, and at these interviews gave her money, and urged her not to oppose the petition, and promised that if she did not he would do no harm to the co-respondent, and would be a friend to her when the decree was obtained, was held to prove collusion, the respondent and the co-respondent not having appeared at the hearing, and material facts shewing that the petitioner had by his conduct conduced to the respondent's adultery having been withheld from the Court.

A petitioner having been found guilty of collusion, and the suppression of material facts, the decree nisi which he had obtained was rescinded, and the petition was dismissed, but, having incurred expense in preparing to meet a charge of adultery which was withdrawn, he was not condemned in the costs of the intervention.

THIS was a petition by a husband for a dissolution of marriage. The petitioner was a valet in a gentleman's service, and the respondent had also been in service. At the time when the adultery was charged to have been committed she was lodging in the house of Grimwade, the co-respondent, who was a baker, the petitioner not living with her, but visiting her from time to time when he could get leave of absence from his service. Neither the respondent nor the co-respondent appeared, and on the 31st of July, 1866, the petition came on for hearing before the Judge Ordinary, and a decree nisi was pronounced. The Queen's Proctor afterwards intervened, and pleaded: 1. That the petitioner had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case. 2. That divers material facts respecting the conduct of the petitioner were not brought before the Court. 3. That the petitioner connived at the respondent's adultery. 4. That the petitioner was guilty of adultery. The petitioner traversed all the allegations, and the cause was heard by the Judge Ordinary on the 21st and 22nd of November, 1867.

The charge of adultery against the petitioner was abandoned,

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but evidence was produced in support of the other charges. It was, in substance, that, before the adultery complained of, and while the respondent was residing in the co-respondent's house, the petitioner and the respondent and the co-respondent had been in the habit of going together to places of amusement; that the respondent and the co-respondent frequently danced together at these places in the petitioner's presence; that the petitioner frequently went away late at night, leaving the respondent and the co-respondent together at these places; and that on two occasions a policeman, who was a friend of the petitioner, had spoken to him as to the imprudence of his conduct, when he remarked that the co-respondent was a good fellow, and would do no harm, and took no further notice.

The substance of the evidence as to the collusion was that the petitioner had several interviews with the respondent after he ceased to cohabit with her, and both before and after the suit was instituted, and that at some of these interviews he gave her money; that they had spoken together about the divorce, and he had told her not to take any notice of the suit, for he could get a divorce for 40*l.* if she did not oppose, and he would be a friend to her hereafter, and would give her money when it was all settled, that he would not hurt a hair of the co-respondent's head, and the expense would not fall on him; that on one occasion, after the petition and citation were served on her, they went together to a public-house, and had refreshment, for which he paid, and she asked him what she was to do with the papers she had received, and he told her they were of no consequence, and she could burn them, and that she was to keep quiet.

Sir J. B. Karslake, A. G., and *Hannen*, were for *the Queen's Proctor*.

Dr. Spinks, Q.C., for the petitioner. The Queen's Proctor's second plea merely alleges the suppression of material facts. The facts upon which the Queen's Proctor relies ought to have been set out.

[THE JUDGE ORDINARY. The petitioner might have obtained an order for particulars of the material facts if he had applied for it. If he has been taken by surprise, I will adjourn the hearing.]

There is no evidence either of connivance or collusion. Unless

the petitioner intended that his wife should commit adultery there was no connivance: *Phillips* v. *Phillips*. (1) The evidence only shews that he was a weak, foolish man, not that he corruptly connived. The respondent had no defence to offer to the suit, and the petitioner, being a poor man, was anxious to get the divorce as cheaply as he could. His asking her not to put him to unnecessary expense by setting up a defence was not collusion. She was entitled to alimony while the suit was pending, and he was at liberty to make her a voluntary allowance in lieu of alimony in order to save expense. That course is constantly taken with the sanction of counsel. There was nothing in the nature of a corrupt agreement to present a false case to the Court, or to suppress a defence.

THE JUDGE ORDINARY [after stating the facts of the case, and referring to the statute under which the Queen's Proctor intervened (2)], said:—I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery.

With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money both before and after the institution of the suit does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending, in order to save the expense of an application to the Court for alimony. If that evidence stood alone, I should hold that it is not sufficient to prove the charge of collusion, but the evidence goes much further. It amounted, in substance, to this, that the petitioner said to the respondent, "If you don't oppose, I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent." If that is not collusion, I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not as far as her own adultery is concerned. But if she had brought to the

(1) 1 Rob. Ecc. 144. (2) 23 & 24 Vict. c. 144, s. 7.

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knowledge of the Court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the Court would have granted a decree.

For these reasons, I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established. The petition must therefore be dismissed.

Hannen. I make no application as to costs, but leave the matter to the Court.

Dr. Spinks. The petitioner has been put to considerable expense in preparing to meet the charge of adultery, which has been abandoned.

THE JUDGE ORDINARY. The petitioner having been put to great expense already in preparing to meet a charge which was not proved, I should not be inclined to condemn him in costs.

Petition dismissed accordingly; no order as to costs.

Attorneys for petitioner: *Shirreff & Son.*
The Queen's Proctor.

Nov. 30.

LYNE *v.* LYNE AND BLACKNEY.

Practice—Claim for Damages—Appearance, but no Answer by Co-Respondent—Right of Co-Respondent's Counsel to cross-examine Witnesses, and address the Court.

A co-respondent from whom damages are claimed, and who has appeared, but has not answered, is not entitled to cross-examine the petitioner's witnesses, or to address the jury on the question of damages. But after the damages have been assessed by the jury, and a decree nisi has been pronounced, he may recall and cross-examine the witnesses, and address the Court on the question of costs.

THIS was a petition by a husband for dissolution of marriage, and claiming damages. The respondent had not appeared. The co-respondent had appeared, but had not answered. The cause was heard before the Judge Ordinary, and a jury was sworn to assess the damages.

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Arundel Rogers, for the co-respondent, proposed to cross-examine the first witness, with a view to the mitigation of damages. Although the co-respondent has allowed judgment to go by default upon the issue of adultery, he is entitled to cross-examine the witnesses, and address the jury upon the questions of damages and costs. By the 33rd section of the 20 & 21 Vict. c. 85, a claim for damages is to be tried "on the same principles, in the same manner, and subject to the like rules and regulations," as an action for crim. con. in a Common Law Court. A defendant in an action for crim. con., who had allowed judgment to go by default, was allowed to cross-examine the witnesses, and to address the jury when the damages were assessed.

Miller, for the petitioner.

THE JUDGE ORDINARY. No doubt, when judgment was allowed to go by default in a Common Law Court in an action for crim. con., and the case went before the sheriff to assess damages, the defendant was allowed to be heard and to call witnesses. But in this Court there is no such thing as judgment by default. The mode of proceeding is altogether different from the mode of proceeding in a Common Law Court by declaration and plea. The object of pleading in this Court, by petition and answer, is to give notice to the other side of the case that will have to be met. In no case has a co-respondent been allowed to cross-examine the witnesses, or to address the jury as to damages, without answering. The Court is always inclined to allow an answer to be filed, in order to give parties an opportunity of being heard, even when the application for leave is not made until the last minute; but no such application was made in this case. The rule and the practice is that, if a co-respondent appears, and does not answer, he can only be heard as to costs. The petitioner had every reason to suppose that this case was to be dealt with as an undefended one, no answer having been filed. I shall not allow you to cross-examine the witnesses or to address the jury; but when the damages have been assessed, and the decree has been pronounced, you may recall any of the witnesses, and cross-examine them upon the question of costs, and I will hear any observations you have to make on the same question.

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The damages were assessed at 100*l.*, and a decree nisi was pronounced.

Arundel Rogers then cross-examined one of the petitioner's witnesses, and addressed the Court on the question of costs. (1)

THE JUDGE ORDINARY. I am satisfied that the co-respondent knew that the respondent was a married woman when the adultery was committed. He will therefore be condemned in costs.

Attorneys for petitioner: *Sole & Turner.*
Attorneys for co-respondent: *Bolton & Grylls Hill.*

1868
Feb. 7.

NELSON *v.* NELSON AND HOWSON.

Costs—Co-respondent—Separation—Subsequent Abandoned Life of Respondent prior to her Adultery with Co-respondent.

Where the petitioner had lived separate from the respondent for several years in consequence of her intemperance, and during the separation and prior to the adultery proved, she had been leading an abandoned life, the Court, notwithstanding that the co-respondent must have known that the respondent when he committed the adultery was a married woman, refused to condemn him in costs.

THE petitioner, Anthony Nelson, formerly a publican and butcher, and subsequently a member of the police force, asked for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent, with costs.

The respondent did not appear; but the co-respondent filed an answer admitting that he had intercourse with a woman passing by the name of Nelson, as in the petition alleged, but alleging that before and at the time when he first had intercourse with her the said woman was and had been living separate from the petitioner for seven years, and had been leading the life of a prostitute for these seven years, and prayed that he should not be condemned in costs.

The petitioner, in reply, denied that the respondent at the time when the co-respondent first had intercourse with her was then

(1) See Rule 50; *Norris* v. *Norris and Gyles*, 1 Sw. & Tr. 174; 27 L. J. (P. & M.) 51; *Tourle* v. *Tourle and Renshaw*, 1 Sw. & Tr. 176; 27 L. J. (P. & M.) 52.

and had been for the space of seven years leading the life of a prostitute.

It appeared by the petitioner's evidence, that the petitioner and respondent were married in 1853, had cohabited at Burton-on-Lonsdale till 1857, at a public-house called the Hen and Chickens, which the petitioner gave up in consequence of her intemperance, that he then left Burton and joined the police force; that at the end of 1857 the respondent left him and returned to Burton, and that he had ever since lived separate from her in consequence of her intemperate habits; that she had since resided alone in a cottage of her own at Burton-on-Lonsdale; that the co-respondent, who was a farmer, was living in Lonsdale whilst the petitioner and respondent were keeping the Hen and Chickens, and that in 1865 and 1866 he was in the habit of visiting her, and that the result of such visits was the birth of a child, of which he acknowledged himself to be the father.

The adultery was not denied by the co-respondent, but it was proved by witnesses examined in support of his answer, that for some time prior to the adultery proved, the respondent had been leading an immoral life.

Dr. Swabey, for the petitioner, asked for the co-respondent to be condemned in costs, as at the time when he formed this connection with her he must have known she was a married woman.

Dr. Tristram, contrà.

THE JUDGE ORDINARY. I pronounce the decree nisi; but I do not think the co-respondent ought to pay the petitioner's costs. The husband separated from his wife in consequence of her intemperance, she returned to the village where she and her husband had formerly lived, and resided there alone for some seven or eight years, when this adultery took place. As early as 1864 she is proved to have been leading an abandoned life. The adultery complained of is not proved to have taken place until 1865. I think this is not a case in which the petitioner ought to have his marriage dissolved at the expense of the co-respondent.

Solicitor for petitioner: *Jeyes.*

Solicitors for co-respondent: *Bower, Son, & Cotton.*

1868
May 5.

ANDERSON *v.* ANDERSON.

Alimony—Practice—Examination of Husband—Rule 86.

A wife who has presented a petition for alimony has a right to subpœna her husband for the purpose of examining him as a witness in support of her petition.

THE wife, who was the petitioner in a suit for judicial separation, had filed a petition for alimony pendente lite, to which the husband had filed an answer. Notice had been given on behalf of the wife that the Court would be moved for alimony upon the husband's answer, and that witnesses would be examined in support of the wife's petition.

Searle, for the petitioner, called the respondent, who had been subpœnaed by the petitioner.

G. Browne, for the respondent. A motion has already been made that the husband should be ordered to attend, and be cross-examined upon his answer under Rule 86. That motion was rejected. It is doubtful whether it is competent to the wife to subpœna the husband to give evidence in support of her petition. If she has a right to do so, there is no necessity for an application under the rule.

THE JUDGE ORDINARY. If the husband is ordered to attend under the rule, his attendance is for the purpose of being cross-examined on his answer; but if he is subpœnaed by the wife, it is for the purpose of being examined, and she adopts him as her witness. As he is a competent witness on the question of alimony she clearly has a right to subpœna him if she pleases.

The respondent was accordingly sworn and examined.

Attorneys for petitioner: *Taylor, Hoare, & Taylor.*
Attorney for respondent: *Keily.*

BLAND *v.* BLAND AND STORMONT.

1868
May 28.

Evidence of Parties—Suit for Dissolution—Charge of Cruelty and Prayer for Judicial Separation in Answer—22 & 23 *Vict. c.* 61—29 *Vict. c.* 32, *s.* 2.

An answer to a petition for dissolution of marriage on the ground of adultery contained a charge of cruelty and a prayer for a judicial separation. The evidence of the respondent was held to be inadmissible to prove the cruelty.

The 2nd section of the 29th Vict. c. 32, empowering the Court to grant relief upon a prayer contained in an answer, does not make any alteration in the law of evidence.

THIS was a petition by a husband for dissolution of marriage on the ground of adultery, and claiming damages. The respondent and the co-respondent traversed the adultery charged, and the respondent's answer contained a charge of cruelty, and a prayer for judicial separation on that ground. The petitioner's replication took issue on the cruelty.

The cause was tried before the Judge Ordinary, by a special jury, on the 23rd and 28th of May, 1868.

At the close of the petitioner's case, *Parry, Serjt.* (*Searle* and *Lumley Smith* with him), for the respondent, tendered her as a witness on the issue of cruelty. It was held in *Whittal* v. *Whittal and Hunt* (1) that the respondent is not a competent witness on an issue of cruelty contained in an answer. But, since that decision, the 29 Vict. c. 32 has been passed, and the second section enacts that "in any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought, on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery, or cruelty, the Court may, in such suit, give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief." The effect of this section is to place a respondent, who prays relief in an answer, in the same position as a petitioner, and as a petitioner for judicial separation on the ground of cruelty is a competent witness, so also is the respondent in this case.

(1) 30 L. J. (P. M. & A.) 43.

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Digby Seymour, Q.C., Dr. Spinks, Q.C., and *Inderwick*, were for the petitioner.

Thomas was for the co-respondent.

THE JUDGE ORDINARY. I am of opinion that I have no power to admit the respondent's evidence. This being a suit instituted on the ground of adultery, the evidence of the parties is excluded. The 6th section of the 22 & 23 Vict. c. 61, introduces an exception to the general rule by rendering the parties competent witnesses as to cruelty and desertion in cases where those charges are alleged in a petition for dissolution, but it is expressly confined to those cases. The 2nd section of the 29 Vict. c. 32, makes no alteration in the law of evidence, and therefore the parties are still excluded when issues of cruelty and desertion are raised in an answer to a petition for dissolution.

The evidence was accordingly rejected.

Attorneys for petitioner: *Hillyer & Fenwick.*
Attorney for respondent: *E. Barron.*
Attorney for co-respondent: *Thomas.*

June 9.

CONRADI *v.* CONRADI, WORRALL, AND WAY, THE QUEEN'S PROCTOR INTERVENING.

Dissolution—Adultery of Petitioner—Judgment in previous Suit—Estoppel—Discretionary Bar—Practice—Examination of Petitioner—Evidence—Judge's Notes of Evidence of Deceased Witnesses—Right of Reply—20 & 21 *Vict.* c. 85, *ss.* 27, 29, 31, & 43.

A petitioner established his wife's adultery in a suit for dissolution of marriage, but the co-respondent established the petitioner's adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents. The Queen's Proctor intervened, and alleged the judgment against the petitioner in the previous suit, and further alleged the fact of the petitioner's adultery. The jury found that the petitioner was not guilty of the adultery charged. But the Court held that the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed.

The Court, in the exercise of the discretion conferred on it by 20 & 21 Vict. c. 85, s. 31, granted a decree nisi, notwithstanding the judgment against the petitioner in the former suit, the act of adultery, if committed, being an isolated one

and unconnected with the respondent's adultery, and the finding of the jury in the second suit, acquitting the petitioner, having thrown doubt upon his guilt.

In a suit for dissolution where the respondent did not appear, the Court allowed the petitioner to be examined, under the 43rd section, and to give evidence upon the issue of his own adultery raised by the Queen's Proctor.

Semble, upon a second trial of the same issues, the judge's notes of the evidence of deceased witnesses who were examined on the first trial are not admissible in evidence except by consent.

In a suit for dissolution no issue was raised as to the respondent's adultery, but the Queen's Proctor intervening, pleaded various pleas, and after the petitioner's case was closed, called evidence to prove them. Evidence having been called on behalf of the petitioner, it was held that, although the petitioner had begun, the Attorney-General on behalf of the Queen's Proctor had the right of reply.

THE petitioner prayed for a dissolution of marriage on the ground of his wife's adultery, and claimed 5*l.* damages from one of the co-respondents. The respondent and the co-respondent did not appear. The Queen's Proctor intervening, alleged collusion, and the adultery of the petitioner with Elizabeth Frost, a sister of the respondent, and that in October, 1865, the petitioner presented a petition for the dissolution of his marriage with the respondent, on the ground of her adultery with W. C. Flashman, and made W. C. Flashman a co-respondent; that W. C. Flashman pleaded the petitioner's adultery with Elizabeth Frost, and that upon the trial of the said suit by the Judge Ordinary it was found and adjudged by him that the petitioner had committed adultery with Elizabeth Frost, and the Judge Ordinary thereupon dismissed the petition. (1) These allegations were traversed by the petitioner, and the cause was tried before the Judge Ordinary by a special jury on the 19th and 20th of March, 1868.

Sir J. B. Karslake, A. G. (with him *W. G. Harrison*), for *the Queen's Proctor.*

Dr. Spinks, Q.C. (with him *Inderwick*), for the petitioner.

The petitioner's case was opened, and the respondent's adultery, which was not traversed by the Queen's Proctor, was proved.

The Attorney-General then opened the Queen's Proctor's case, and put in evidence the proceedings and the judgment in the former suit. He then proposed to put in evidence the judge's notes of the evidence of two witnesses who were examined in the

(1) See ante, p. 391.

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former suit to prove the petitioner's adultery, and who had since died.

Dr. Spinks admitted that the witnesses were dead, but objected to their evidence being read from the Judge's notes.

THE JUDGE ORDINARY. The Queen's Proctor has alleged both the judgment in the former suit finding the petitioner guilty of adultery, and also the fact of adultery, and issue has been taken by the petitioner on both those allegations. Two witnesses who were examined in the former suit to prove the petitioner's adultery being dead, it is proposed to read the judge's notes of their evidence. I know of no principle on which I can receive the judge's notes as evidence on the issue of adultery. One of the objections to receiving them is that the suit is not between the same parties.

The Attorney-General. The suit is substantially the same as far as the husband and wife are concerned. He cited *The Mayor of Doncaster* v. *Day* (1); *Strutt* v. *Bovingdon.* (2)

THE JUDGE ORDINARY. I have known the judge's notes read by consent, and it has been made a condition of granting a new trial that they shall be admitted. I will admit the evidence de bene esse, reserving the question of its admissibility for argument at a future time.

The judge's notes of the evidence of the deceased witnesses were read.

At the close of the Queen's Proctor's case, *Dr. Spinks* tendered the petitioner for examination under the 43rd section of 20 & 21 Vict. c. 85, and cited *Marris* v. *Marris & Burke.* (3)

THE JUDGE ORDINARY. No doubt the Court has a great latitude as to the examination of a petitioner under that section; the reason why it cannot be resorted to in many cases is the extreme injustice that would arise in a contested suit from allowing a husband to get into the witness-box when his wife is excluded. But it is the common practice of this Court in undefended cases, where circumstances are brought out in evidence tending to show

(1) 3 Taunt. 262. (2) 5 Esp. 56. See Tayl. Ev. Part II. c. v. s. 491.
(3) 2 Sw. & Tr. 530.

that the husband may have been guilty of some matrimonial fault, to call him into the box in order to hear his explanation. I think that in this case it is desirable that the petitioner should be examined. The question now at issue is not the wife's adultery, but the recriminatory charge which stands in the way of the relief to which the husband would otherwise be entitled. The wife has not appeared and answered, and therefore no injustice can arise from her exclusion from the witness-box. The enormous advantage of having the petitioner in the box, and the desirability of getting at the truth, prevail in my mind over every other consideration.

The petitioner was accordingly sworn and examined by *Dr. Spinks*, and cross-examined by *the Attorney-General*. He contradicted the witnesses whose evidence had been read from the judge's notes, and denied that he was guilty of the adultery charged. Elizabeth Frost, and other witnesses, were also examined on behalf of the petitioner.

At the close of the evidence a question was raised as to the right of reply, and

THE JUDGE ORDINARY ruled that there being no issue as to the respondent's adultery, and the only issues raised being upon the allegations of the Queen's Proctor, the Attorney-General was entitled to reply.

Dr. Spinks accordingly summed up the petitioner's case, and

The Attorney-General replied.

The jury found that the petitioner was not guilty of the adultery charged. The verdict was entered for the Queen's Proctor, on the issue as to the judgment in the former suit. The claim for damages against the co-respondent was abandoned.

May 12. *Dr. Spinks, Q.C.*, moved for a decree nisi.

The Attorney-General opposed the motion. The first question is whether the finding in the former suit amounts to an estoppel. The two suits are between the same parties, i.e., between husband and wife. The fact that the co-respondents in the two suits are different persons is immaterial. The co-respondent is not a neces-

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sary party to the suit, for the Court has power to dispense with him. The real parties to the suit are the husband and wife, and the judgment in the former suit is between the same parties, and estops the petitioner. If it were not so, a husband might bring suit after suit against his wife, and although she may prove his adultery over and over again, yet if in any one suit he should succeed in disproving it he would obtain a divorce.

The second question is whether under the 31st section of the 20 & 21 Vict. c. 85, the petitioner is entitled to a decree notwithstanding his adultery. That is a question entirely for the discretion of the Court.

Dr. Spinks, in reply. The Court decided the question of estoppel on the argument on the dumurrer. (1)

[THE JUDGE ORDINARY. The Court was not in a condition to decide that question on the demurrer, because the Queen's Proctor not only pleaded the finding in the former suit, but went on to allege the fact of adultery, on which issue was taken.]

The words of the statute are clear, that "in case the Court shall be satisfied *on the evidence* that the case of the petitioner has been proved, &c., then the Court shall pronounce a decree declaring such marriage to be dissolved; provided always that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery," &c. The Court must therefore be satisfied *on the evidence* produced in the cause, that the petitioner's adultery is established before it can refuse the relief to which he is entitled on the ground of his wife's adultery. If the former judgment were an estoppel, the Court would have directed the jury that it was conclusive evidence of the adultery.

[THE JUDGE ORDINARY. There is a clear distinction between an estoppel and conclusive evidence. An estoppel is set up by the pleadings, and where there is an estoppel the issue does not go to the jury. But if there is no estoppel, the issue goes to the jury, and when the jury are sworn to try the issue they are bound to find the fact according to the evidence laid before them.]

The finding in the former suit is not a judgment determining the status of the parties as a decree dissolving a marriage

(1) Ante, p. 391.

would be: *Needham* v. *Bremner.* (1) The issue is not between the same parties; in the former case it was between the petitioner and the co-respondent, who is not a party to this suit, and it is now between the petitioner and the Queen's Proctor. It would be a great hardship that a petitioner, who has succeeded in disproving a charge of adultery, should be liable to have it re-opened and tried again and again (*Harding* v. *Harding and Lance; the Queen's Proctor intervening*) (2), and yet that he should not be allowed to re-open it if the issue has been found against him. An isolated act of adultery committed many years before the respondent's adultery, and condoned by her, does not necessarily operate as a bar to a decree: *Anichini* v. *Anichini.* (3)

THE JUDGE ORDINARY. I will take time to consider my decision. I have at present a strong impression that when once a man has been found guilty of adultery, the Court must take that finding of the fact as conclusive, and not allow the case to be tried over again, when, perhaps, the witnesses who proved it may be dead, as in the present case. The Queen's Proctor, however, was not content with taking his stand on the previous finding, but chose to have the fact tried over again by another tribunal, which has found a verdict in the petitioner's favour. That may, perhaps, be a ground for not refusing a decree. After all, the petitioner's adultery is a discretionary, not an absolute, bar, and a petitioner ought not to be refused a relief to which he has established his right except on very clear grounds.

Cur. adv. vult.

THE JUDGE ORDINARY. The petitioner first applied to the Court for relief in the year 1865. He proved his wife's adultery without difficulty, for she had left him and taken to a life of prostitution. But one of the co-respondents in that suit charged the petitioner himself with adultery. This charge was sustained by the evidence of two witnesses, and the Court found the charge to have been proved. Thereupon the Court, by its final decree, adjudged the petitioner to have been guilty of adultery, and dismissed his petition.

(1) Law Rep. 1 C. P. 583.

(2) 4 Sw. & Tr. 145; 34 L. J. (P. M. & A.) 9.

(3) 2 Curt. 210, 218.

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In July, 1866, the petitioner commenced the present suit against his wife, charging her with adultery with two other men. And again, owing to the life she was leading, he had no difficulty in establishing her guilt. But the Queen's Proctor intervened, and by his plea brought to the notice of the Court the fact that it had on the former occasion adjudged the petitioner himself guilty of adultery, and prayed that his present petition might, therefore, be dismissed. In addition to this, the Queen's Proctor offered to prove over again the very act of adultery which had been alleged and proved in the former suit. Upon this re-allegation of the adultery issue was taken and a trial had by jury.

Both the witnesses to the adultery were dead. The judge's notes of their evidence were read to the jury de bene esse, subject to the determination of the Court as to their admissibility, and the jury held the adultery not proved. In the view I take of the case it will not be necessary to decide this point of evidence. I will only say that I know no authority, or practice, by which the judge's notes on a former trial are admissible in evidence in another suit, if objected to.

The question which arises in this state of things is, no doubt, a very important one. It is this, whether a husband who has once, in a suit against an adulterous wife, been himself found guilty of adultery, and on that ground, by sentence of this Court, been refused all remedy for his wife's incontinence, can upon proof of a fresh act of adultery by her insist upon a divorce unless his own adultery is proved over again by evidence against him.

In my judgment he has no such right. Everything turns upon the words contained in s. 31: "Provided always, the Court shall not be bound to pronounce such decree, *if it shall find* that the petitioner has during the marriage been guilty of adultery." "If it shall find." Do these words necessarily mean "find" on fresh evidence, or is the Court at liberty to "find" the petitioner's adultery upon proof of a former decree pronounced by the same court between the same husband and wife?

I am of opinion that the Court is at liberty to regard the decree in the former suit, and upon reference to it, without further evidence, to "find" that the petitioner has been guilty of adultery.

It is to be observed that the duties of this Court are not confined

to the solution of such questions of fact or law as the parties to the suit may please from time to time, in the course of the suit, to submit to its decision. The general language of the act, notably that of s. 29, as well as that of the section under consideration, appear to me to impose upon the Court a wider function. It is, in my judgment, immaterial upon whose allegation the adultery of the petitioner is brought to the notice of the Court, for if the fact of that adultery is established to the satisfaction of the Court upon legitimate evidence, the Court is bound to take notice of it. I am not, therefore, pressed by the argument that the adultery in the former suit was alleged by a co-respondent who is no party to this suit, whereas in this suit it is alleged by the Queen's Proctor. The only real question is, whether the Court can legitimately receive and act upon the decree in the former suit as evidence in this, and my judgment is that it can; for by whomsoever the petitioner's adultery was alleged in the former suit, that adultery was declared and adjudged to have been proved in a decree pronounced between the very parties who (so far as the question of divorce is concerned) are the sole parties to this suit. Nay more, it was the very fact upon which that decree dismissing the petitioner's suit was founded. I know of no principle of evidence which should exclude such a decree.

Thus far upon the strict and technical view of the matter. But it is impossible not to perceive that if the Court were not to decide in conformity with that view, one of the main objects of the legislature might be frustrated. If a man desirous of obtaining a divorce could insist upon having the question of his own adultery tried over and over again, as often as he pleased, he would be pretty sure to succeed at last. What with the oversight or indifference of opponents, the death of witnesses, failure of memory, loss of documents, and the inevitable obscurity which the lapse of time throws about past events, he would at last succeed in proving his wife's adultery without any proof made of his own.

But again, who is to undertake the proof against him? A wife in such case would be little likely (as in this case) to oppose him. The Queen's Proctor is authorized to intervene, at the public expense, for the express purpose of preventing such a man from obtaining a decree. Is he to incur that expense over and over

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again, as often as the petitioner pleases? Such considerations as these throw a further light on the intention of the statute, and fortify the construction of the 31st section, which I have already declared.

It only remains to advert to one other matter much pressed in the argument. It was pointed out that the statute 23 & 24 Vict. c. 144, s. 7, imposed no limit upon the number of occasions on which the Queen's Proctor might intervene before the decree absolute, and bring fresh facts before the Court to prove the petitioner's adultery; and it was urged that if the petitioner could thus, as it were, be put upon his trial several times for the same act of adultery, he ought in fairness to enjoy a similar latitude. But the position of the petitioner and that of the Queen's Proctor are in no respect alike. The Queen's Proctor is under the control, first of the Attorney-General and then of the Court, and although the statute does not in terms prohibit him from interposing more than once between the petitioner and his decree, no instance or decision has yet shewn that he would be allowed vexatiously to re-open a question which had been once fairly tried.

Assuming, then, that it is competent to the Court to act upon the decree in the former suit, the remaining question is, whether, in the very peculiar circumstances of this case, the Court should exercise its discretion under the authority of section 31, by refusing to dissolve this marriage? I am by no means satisfied that it should.

That which has happened in this case will not (if my decision on the main matter should be held correct) in any probability happen again. The question of the petitioner's adultery has in fact been twice tried, and with different results. The act of adultery, if committed, was an isolated one. It had no connection whatever with the desertion by the respondent of her home, or with her abandoned life. In the doubt which the second inquiry has thrown upon the act of adultery itself, and in the circumstances which attended it, if committed, the Court may properly, I think, find grounds for according to the petitioner the relief he prays, and in that conviction I grant him a decree nisi.

Attorneys for petitioner: *Pritchard & Collette.*
The Queen's Proctor.

HOLMES, BY HIS GUARDIAN, *v.* SIMMONS, FALSELY CALLED HOLMES. 1868

June 16.

Nullity—Marriage before Registrar—Due Notice—Untrue Statements in Notice —6 & 7 Wm. 4, c. 85; 1 Vict. c. 22; 19 & 20 Vict. c. 119.

The "due notice" required by the Registration Acts for the validity of a marriage before a registrar, is a notice conforming to the formalities provided by the 6 & 7 Wm. 4. c. 85, and the words "due notice" will be satisfied, though the contents of the notice in respect of christian names and residences of the parties, or other details, are not accurate.

There is no analogy between a marriage by banns and a marriage by notice before the registrar. The decisions as to what constitutes undue publication of banns, under the 4 Geo. 4, c. 76, are not therefore applicable to a question of what constitutes undue notice under the Registration Acts.

Quære, whether undue publication of banns would invalidate a marriage if, at the time when it was celebrated, there was no person in existence who had a legal right to assent to or dissent from its celebration?

THIS petition for a decree of nullity of marriage was presented by the direction of Malins, V.C., the petitioner being a ward in Chancery.

The petitioner, Frederick Cyril Robins Holmes, was a minor, and appeared by his guardian.

The petition alleged that previously to and with a view to the celebration of the marriage, to wit, on the 27th of October, 1866, the petitioner, with the knowledge and at the instigation of Laura Emma Harris Simmons, the respondent, gave and subscribed the following notice at the office of the superintendent registrar of the district of Oxford:—"I the undersigned Frederick Holmes hereby give you notice that a marriage is intended to be had without licence, within three calendar months from the date hereof, between me and the other party herein named and described," that is to say:—

Name or Surname.	Condition.	Rank or Profession.	Dwelling-place.	Length of Residence.	Church or Building.	District of County where parties respectively Dwell.
Frederick Holmes.	Bachelor.	Gentleman.	Jericho, St. Thomas.	Seven days.	Registrar's Office.	Oxford, Oxfordshire.
Laura Simmons.	Spinster.		Holywell-st., Holywell.	More than a month.	"	Oxford, Oxfordshire.

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That such notice was not a due notice according to the statute, and the certificate of such notice, dated the 19th of November, 1866, issued by the superintendent registrar of the district of Oxford, was not duly issued; that on the 19th of November, 1866, at the time of the marriage, the petitioner and the respondent, or one of them, knew that the notice was not a due notice according to the statute, and that it had been given in such a form as to conceal the intended marriage from the family of the petitioner, and to deceive them in relation thereto; and further, that the certificate of such notice was not duly issued; that no licence was obtained for the celebration of the marriage from the superintendent registrar of any district; and the petitioner prayed for a declaration of the nullity of the marriage celebrated between himself and the respondent on the 19th of November, 1866.

The respondent's answer traversed the various allegations in the petition.

The cause was heard by the Judge Ordinary without a jury on the 2nd of May, 1868.

The effect of the evidence, as far as it is material, is stated in the judgment. The particulars in which the notice was incorrect were the suppression of the full christian names of both the parties; the age of the petitioner, he being between fifteen and sixteen years of age in October, 1866, instead of nineteen; the dwelling-place of the parties, both of them residing at Kidlington, about five miles from Oxford, and out of the Oxford district; and the length of residence.

Coleridge, Q.C., *Dr. Middleton*, and *McIntyre*, for the petitioner. If the marriage had been by banns, and the banns had been published in the terms of the notice, with the knowledge of the parties, for the purpose of fraudulent concealment, the marriage would have been void. Notice to the registrar stands in the place of publication of banns (1 Vict. c. 22, s. 36), and undue notice is as much a ground of nullity as undue publication.

Denman, Q.C., and *Lord*, for the respondent. If this were a question of the publication of banns, the evidence does not bring the case within any of the decisions under the 4 Geo. 4, c. 76, and if the banns had been published in the terms of the notice, there

would have been a due publication. But the Registration Acts do not impose the penalty of nullity for a misdescription in the notice, even although it may have been given with a fraudulent intention. The penalties of perjury and the forfeiture of property are attached to the giving of false information in the notice, and without an express enactment, the Court cannot add the penalty of nullity.

[THE JUDGE ORDINARY. Before the passing of the Registration Acts, the system of marriage by banns obtained, and the 4 Geo. 4, c. 76, s. 22, made a marriage, "without due publication of banns," null and void. Then came the Registration Acts, and the system of giving notice was substituted for that of publication of banns. By the first of these acts (6 & 7 Wm. 4, c. 85, s. 42), it is provided that if persons knowingly and wilfully intermarry without due notice to the registrar, or without certificate of notice duly issued, the marriage is null and void, but the very next section (43) goes on to enact that when a marriage is had by means of a wilfully false notice, then (not that the marriage shall be null and void), but that the Attorney-General may sue for a forfeiture of property; and the 38th section imposes the penalty of perjury on every person wilfully making a false declaration or signing a false notice. These sections seem to indicate very clearly that the legislature intended to institute a system of giving notice to the registrar, with the penalty of perjury for giving a false notice, and of forfeiture of property after the marriage, but not to make the marriage void. The next act (19 & 20 Vict. c. 119) makes no alteration in this system, except in one respect. A notice is still required, but it is declared to be no longer necessary to read the notice to the board of guardians, but in lieu thereof it is to be stuck up in the registrar's office; but this act, like the former one, contains no provision whatever for the invalidity of the marriage. That system being established, it seems to me that it would be a strong thing to say that because the legislature has, by the 36th section of the 1 Vict. c. 22, provided that the giving of notice to the registrar, and the issuing of his certificate, shall be used and stand instead of the publication of banns to all intents and purposes; therefore, whatever would have constituted undue publication of banns shall constitute undue notice, and all the penalties attaching to undue publication shall attach to undue notice.]

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Coleridge, Q.C. What is the "due notice" in the 42nd section of the 6 & 7 Wm. 4, c. 85, without which the marriage is null and void? It means true notice—such a notice that the persons interested may have an opportunity of stopping the marriage if they please.

[THE JUDGE ORDINARY. The petitioner had no parents, and at the time of the marriage he had no guardian. Who could have interfered so as to justify the registrar in refusing to celebrate the marriage?]

His friends and relatives would have had notice, and would have entered a caveat, and the registrar would have suspended his certificate. In the meantime the Court of Chancery would have appointed a guardian.

The following cases and statutes were cited:—*Pouget* v. *Tomkins* (1); *Midgeley* v. *Wood* (2); *Bevan* v. *McMahon* (3); *Sullivan* v. *Sullivan* (4); *Rex* v. *Billinghurst* (5); *Rex* v. *Tibshelf* (6); *Tongue* v. *Tongue* (7); 26 Geo. 2, c. 33; 4 Geo. 4, c. 76; 6 & 7 Wm. 4, c. 85, ss. 4 and 42; 1 Vict. c. 22, s. 36; 19 & 20 Vict. c. 119.

Cur. adv. vult.

June 16. THE JUDGE ORDINARY. This is a suit to annul a marriage between two parties, one of whom was a minor. The marriage took place at the registrar's office in Oxford on the 19th of November, 1866, and the ground of nullity alleged is, that the parties wilfully intermarried without "due notice" having been given to the proper officer. A notice, regular in point of time, form, and other legal requirements, was, in fact, given; but this notice is argued not to have been a "due notice," because the names of the parties were not truly stated in full, and the statements as to age and residence were not true.

No case has hitherto been decided on this subject, but it was contended that the cases of marriage by banns were analogous, and that the decisions in those cases, as to what constituted a "due publication" of banns, ought to guide the courts in deter-

(1) 2 Const. 142.
(2) 30 L. J. (P. M. & A.) 57.
(3) 2 Sw. & Tr. 230; 30 L. J. (P. M. & A.) 61.
(4) 2 Const. 238.
(5) 3 M. & S. 250.
(6) 1 B. & Ad. 190.
(7) 1 Moo. P. C. 90.

mining what was a "due notice" to the registrar. For the reasons I am about to give I have come to a contrary conclusion.

For the right understanding of the subject it is necessary to review the successive statutory provisions upon marriage by banns, and those also by which marriage at the registrar's office has been created and regulated.

By the statute 26 Geo. 2, c. 33, all marriages by banns, if had without "due publication of banns," were absolutely void. The courts construed this provision with great severity, holding that, independently of any fraudulent intention, the names published must be the true and full christian and surnames, or, at any rate, so nearly so as to render recognition easy. Upon this statute it was that the numerous decisions of Lord Stowell referred to in the argument took place.

The statute of 4 Geo. 4, c. 76, mitigated the rigour of the previous provisions. It enacted that these marriages should only be void if the parties "knowingly and wilfully intermarried" without "due publication." It thus became necessary that *both parties* should be guilty of a wilful neglect to have the true names put forward. This statute further provided that, after the marriage had once been celebrated, no question should be raised as to whether the residence of the parties had been truly stated.

The next statute, the 6 & 7 Wm. 4, c. 85, first introduced the system of marrying before a registrar. It did not alter the above provisions as to marriage by banns. It provided that a previous notice should be given by the person about to marry to the registrar, and that such notice should be full, giving the names, condition, and residence of the parties. The notice, when given, was to be entered in a book accessible to the public. Further, the notice was to be read three successive weeks at the board of guardians. And then the statute went on to say, that if persons wilfully intermarried without "due notice," &c., the marriage should be void. In these provisions it is easy to recognize an intended analogy to the method of proceeding by banns. And if these provisions had remained unchanged, there would be strong ground to contend that the courts ought to construe the word "due," in relation to the required "notice," in conformity with the

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decisions upon the meaning of that word when applied to the publication of banns.

But a subsequent statute has made a great and, as it appears to me, an all-important change in the method of proceeding to marriage before the registrar. The 19 & 20 Vict. c. 119, has done away with the system (probably found useless) of reading the notice to the board of guardians, and in place of all such and similar contrivances for giving to parents a warning of the projected marriages of their minor children it has provided (under the pains and penalties of perjury) that the party giving the notice should swear that he or she actually had the required consent. In this provision the legislature in fact assimilated marriages by notice to marriages by licence. For throughout the period embraced by all the foregoing statutes, marriages by licence of the ecclesiastical authorities had been permitted; and to obtain such licences it was always necessary in the case of minors to swear that the consent of the parents had been obtained. In conformity with this system the Act of Wm. 4 empowered the registrar to grant similar licences upon a like oath of actual consent.

Having thus provided for the consent of parents under the penalties of perjury, both the statutes, that of Wm. 4 and that of Victoria, have distinctly enacted that after the celebration of the marriage no proof should be allowed of the absence of such consent. In respect, therefore, of the consent of parents, I conceive that any analogy which existed between marriages by banns and marriages by notice to the registrar has been effaced—the attempt at securing that consent in marriages of the latter class by publicity relinquished—and the procurement of actual consent substituted in the same manner as had always been used in marriages by licence. There is no reason, therefore, why those decisions which have hitherto only been applied to marriages by banns, and which have their foundation in the necessity for securing that publicity through which it is the object of banns to reach the parents' consent, should be applied to marriages in which that consent is otherwise attained and secured. Cessante ratione cessat et lex. I think, therefore, that the "due notice" required by the statute for the validity of a marriage such as that now in question, is a notice conforming to the formalities by the statute provided,

and that the words "due notice" will be satisfied though the contents of the notice in respect of christian name or residence or other details are not strictly true or accurate.

Whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all, may possibly still be a question.

It might suffice to stop here, but I think the parties are entitled to my judgment on the result of the evidence which was laid before me. I arrive at the following conclusions of fact. First, that the christian names inserted in the notice, though not the full christian names, were the names, and the only names, by which both parties were commonly and familiarly known by those among whom they lived. This was plain on the evidence on both sides. Next, that it is very doubtful whether there was any intention to deceive anybody by the use of those names; but if there was such intention it existed only on the part of the husband. Lastly, that the suppression of the remaining names of both parties, and the insertion of the false residences, was the act of the husband only, without the wife's concurrence. For there is no evidence which satisfies me that the wife's statement on this subject is not worthy of reliance. Everything that was done in the matter of the notice, including all inquiries made, was done by the husband alone. The attempt to shew that the wife had obtained knowledge of what was requisite, and had tutored the husband as to the notice he should give with a view to concealment, wholly failed. The wife swore that on her only visit to the registry the proper officer was absent, and she got no information from any one. If this was untrue, the officer who gave her any information might have contradicted her. If it was true, the husband, when he went to the registry and gave the notice, must in all probability have acted without the wife's concurrence, for they were both ignorant before he went of the details that would be required, and could hardly have concurred in a common design to falsify them.

If these conclusions are warranted by the evidence the marriage would be valid, though tested by the decisions applicable to marriage by banns. For the suppression of a dormant christian name was held by Lord Stowell, in *Pouget* v. *Tom-*

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kins (1), not to constitute an undue publication of banns, and even if it did, the concurrence of both parties in that suppression would be necessary to annul the marriage under the provisions of the statute.

I must notice one further feature in this case before I conclude. At the time of this marriage, though the husband was a minor, there was no person in existence who had the legal right to assent to, or dissent from, its celebration. Suppose then it had been celebrated by banns, could the Court have held it invalid for want of the true names being published? I very much doubt it. It does not very distinctly appear whether in all the cases in which the marriage of a minor has been held void there has been a dissenting parent or guardian, but the reason of the thing would seem to demand that to invalidate such a marriage there should have been the absence of such consent. If this be not so, the further question might be asked, what if the parents had actually consented? Would the absence of such a publication of names as would be likely to give them notice of the intended marriage be sufficient to annul that marriage if they had all along been parties to it and given their consent?

It is not necessary to decide this matter in the present case; it is enough to have glanced at it. If my previous conclusions are correct, this marriage was a valid one, and the Court so pronounces it.

Petition dismissed.

Attorneys for petitioner: *Purkiss & Co.*
Attorneys for respondent: *T. White & Sons.*

(1) 2 Const. 142.

DERING *v.* DERING AND BLAKELEY, THE QUEEN'S PROCTOR AND OTHERS INTERVENING. 1868 *July 7.*

Intervention—Practice—Pleading—Right of Counsel for two sets of Parties in the same interest to take part in Trial—Misconduct conducing to Adultery—Decree absolute after Verdict—Death of Parties before a Decree—Costs of Intervention.

The Queen's Proctor intervening in a suit under the 7th section of the 23 & 24 Vict. c. 144, and alleging collusion, is at liberty in the same plea to allege the suppression of material facts or any other matters in opposition to the decree.

The same issues being raised by the Queen's Proctor and by other interveners, the case was conducted by counsel for the Queen's Proctor, and the Court refused to allow counsel for the other interveners to address the jury, although they were allowed to examine and cross-examine the witnesses.

The misconduct conducing to adultery intended by the 31st section of the 20 & 21 Vict. c. 85, is not mere carelessness. Before a husband is found guilty of such misconduct, it must be proved that there was an intimacy between the respondent and the co-respondent of such a character as to be distinctly dangerous, that he actually knew so much of the intimacy as to perceive the danger, and that he either purposely or recklessly disregarded it, and forbore to interfere.

After the trial by a jury of issues arising from an intervention, the Court will not make a decree absolute immediately after a verdict in favour of the petitioner, but will postpone it until the time has expired for an application for a new trial.

The Court made a decree absolute, notwithstanding a suggestion supported by affidavits, that the respondent and co-respondent were dead; the evidence before it not being sufficient to enable it to arrive at a conclusion whether they were dead or alive.

Quære, whether the Court has power to condemn an unsuccessful intervener in the costs of his intervention.

THIS was a petition by Edward Cholmley Dering for a dissolution of his marriage with Harriet Mary Dering, on the ground of her adultery with Theophilus Alexander Blakeley. The respondent and co-respondent filed answers traversing the charge of adultery, and the co-respondent also pleaded connivance. The cause was heard by the Judge Ordinary, without a jury, on the 21st of June, 1867. The petitioner's case was proved, and no witnesses were called for the respondent and co-respondent, and a decree nisi was pronounced. On the 1st of November, 1867, Mr. and Mrs. Capel, the father and mother of the respondent, entered an appearance and filed affidavits shewing cause against the decree. Affidavits in reply were filed on behalf of the petitioner, and on

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the 14th of January, 1868, the Judge Ordinary ordered the questions of fact raised by these affidavits to be tried by a special jury. These questions were—1. Whether the petitioner was accessory to or connived at the respondent's adultery? 2. Whether the decree nisi was obtained by collusion with the respondent and co-respondent, or either of them? On the 17th of March, 1868, the Queen's Proctor, by leave of the Court, intervened, and afterwards filed a plea alleging—1. That the parties to the suit are and have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case. 2. That before the commission of the acts of adultery alleged in the petition, the respondent did, in the months of November and December, 1865, and in the months of January, February, and March, 1866, at No. 1, Bolton Street, in the county of Middlesex, on divers occasions, habitually commit adultery with the co-respondent. 3. That before the commission of the acts of adultery alleged in the petition, the respondent did in the months of April and May, 1866, on board a certain yacht, and at divers places in parts beyond the seas, habitually commit adultery with the co-respondent. 4. That at the respective times of the filing of the petition, and the hearing of the suit, the said adultery was known to the petitioner, and was not brought before the Court. 5. That the petitioner connived at the adultery alleged in the petition and in this plea. 6. That the petitioner was guilty of misconduct which conduced to the adultery alleged in the petition and in this plea.

April 21. *Horace Lloyd, Q.C.*, moved on behalf of the petitioner for an order to strike out the 2nd, 3rd, 4th, 5th, and 6th paragraphs of the plea filed by the Queen's Proctor. As the Queen's Proctor has intervened in his official capacity, and is not shewing cause against the decree as one of the public, he can only allege collusion. He referred to the 23 & 24 Vict. c. 144, s. 7; rules 68 to 76; *Lautour* v. *The Queen's Proctor* (1); *Masters* v. *Masters, the Queen's Proctor intervening* (2); *Drummond* v. *Drummond* (3); *Boulton* v. *Boulton and Page.* (4) If he wishes to bring material

(1) 10 H. L. C. 685. 10 Jur. N.S. 375 (3) 2 Sw. & Tr. 269; 30 L. J. (P. M & A.) 177.
(2) 34 L. J. (P. M. & A.) 7.
(4) 2 Sw. & Tr. 551.

facts before the Court, he should enter an appearance and file affidavits.

W. G. Harrison, for *the Queen's Proctor*, opposed the motion.

THE JUDGE ORDINARY. It is suggested that the Queen's Proctor is acting under the first part of the section in question, which authorizes "any person" to shew cause against a decree by reason of collusion, or of material facts not brought before the Court. I am not sure that the Queen's Proctor is not authorized to take the course which he has taken under the latter part of the section, but assuming that he is acting under the first part, in what form ought he to bring the "material facts" before the Court? The section enacts that he is to do so "in such manner as the Court shall by general or special order in that behalf from time to time direct." The Court has made certain general orders under the section, two of which, the 68th and 69th, apply to the intervention of the Queen's Proctor, and the rest to cause being shewn by "any person" against a decree. It seems to me that this latter rule as to shewing cause against a decree by any person, cannot apply to the Queen's Proctor. He has intervened under the latter part of the section to prove collusion, and is before the Court as a party to the suit. It cannot, therefore, be necessary that he should enter an appearance, as prescribed by those rules, before he is allowed to bring material facts before the Court. It has hitherto been the practice that he should set out such facts in the same plea in which he alleges collusion. That was the course taken in the case of *Lautour* v. *The Queen's Proctor* (1), upon which Mr. Lloyd relies, and the expressions used by the Judge Ordinary in *Drummond* v. *Drummond* (2) do not suggest any doubt as to the propriety of the practice, but merely point out that in consequence of the mode in which the petitioner had pleaded, the question did not arise. The latter part of the section authorizes the Queen's Proctor to take cognizance not only of collusion, but also of "any matter material to the due decision of the case." It would surely be very inconvenient to hold that in every case in which the Queen's Proctor alleges collusion, together with the adultery of the petitioner, or any

(1) 10 H. L. C. 685. 10 Jur. N.S. 325.

(2) 2 Sw. & Tr. 269; 30 L. J. (P. M. & A.) 177.

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other matter, he should intervene and plead under the direction of the Attorney-General with regard to the collusion, and should enter an appearance and file affidavits with regard to the adultery or other matter. The convenience of the suitors, who ought not to be put to the expense of a double proceeding, and the practice of the Court, point in the same direction, and in accordance with the practice, I hold that the Court has power to allow the Queen's Proctor to bring collusion and all other matters before the Court in one plea.

Motion rejected.

The petitioner took issue upon the allegations in the Queen's Proctor's plea, and the questions at issue were ordered to be tried by a special jury. The questions were—1. Whether the respondent committed adultery with the co-respondent in November and December, 1865, and in January, February, March, April, and May, 1866, at 1, Bolton Street, and on board a yacht? 2. Whether the petitioner was accessory to or connived at the adultery of the respondent with the co-respondent? 3. Whether the decree nisi obtained by the petitioner on the 21st of June, 1867, was obtained by him by or in collusion with the respondent and the co-respondent? 4. Whether the petitioner was guilty of misconduct which conduced to the adultery of the respondent? The cause was tried on the 4th and 5th of June, 1868.

Sir J. B. Karslake, A. G., Sir W. B. Brett, S. G., and *W. G. Harrison,* for *the Queen's Proctor.*

M. Chambers, Q.C., and *Hance,* for Mr. and Mrs. Capel and the other interveners.

Parry, Serjt., Dr. Spinks, Q.C., and *Dr. Middleton,* for the petitioner.

A question was raised as to the right of the counsel for the two sets of interveners to take part in the trial. The case was opened by the counsel for *the Queen's Proctor.*

THE COURT allowed the witnesses called by *the Queen's Proctor* to be examined in chief by the counsel for Mr. and Mrs. Capel before they were cross-examined, and allowed the witnesses called by the petitioner to be cross-examined by the counsel for Mr. and Mrs. Capel after their cross-examination by the counsel for *the*

Queen's Proctor, but refused to allow the counsel for Mr. and Mrs. Capel to address the jury. At the close of the petitioner's case it was summed up by *Parry, Serjt.*, and *the Solicitor-General* replied on behalf of *the Queen's Proctor*. (1)

THE JUDGE ORDINARY, in summing up, directed the jury as follows upon the issue whether the petitioner had been guilty of misconduct conducing to the respondent's adultery. The 31st section of the Divorce Act provides that the Court shall not be bound to pronounce a decree if the petitioner shall, in the opinion of the Court, have been guilty of such wilful neglect or misconduct as has conduced to the adultery. The statute, therefore, throws upon the Court the responsibility of saying whether the petitioner has been guilty of wilful neglect or misconduct, and if he has whether it is of such a nature that he ought not to have a decree. But I much prefer leaving the question of fact in a matter of this kind to the jury to being guided entirely by my own opinion. I believe this is the very first case since the passing of the statute in which the facts and circumstances have made it necessary to consider the precise meaning of the words "wilful neglect and misconduct." The words are very large and general, but I must not shrink from the responsibility of giving you for your guidance as clear a definition of them as I can, and pointing out what, in my judgment, ought to be proved in order to establish a charge of misconduct. Reflect on the great variety of cases, on the various conditions of things which may give rise to such a question. There is hardly a divorce case in which, scanning the circumstances

(1) Feb. 29. POCOCK AND ANOTHER *v.* LOWE AND MOORE.—The plaintiffs propounded a will which was opposed by the two defendants, one of whom was the next of kin, and the other was the heir-at-law of the testator. They both pleaded the same pleas. The cause was tried before Sir J. P. Wilde, by a special jury.

Dr. Spinks, Q.C., Searle, and *Finney*, for the executors.

Dr. Deane, Q.C., Coleridge, Q.C., and *Inderwick*, for the next of kin.

Huddleston, Q.C., and *S. Will*, for the heir-at-law.

The question was raised as to the right of counsel for the heir-at-law to take part in the trial as well as counsel for the next of kin.

SIR J. P. WILDE said it was a matter entirely in the discretion of the judge, and allowed Huddleston to cross-examine the plaintiff's witnesses after they had been cross-examined by Dr. Deane, and also to address the jury after Dr. Deane had opened the case of the next of kin.

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after the wife has left her home and everything is known, you might not put your finger upon some particular date or fact, and say "What a pity the husband did not interfere here. If he had not been very careless, if he had taken better care of his wife, he would have done this or done that." When an intimacy springs up between a married woman and a man who is not her husband, of a character not justified by the ordinary usages of society, the husband's vigilance, no doubt, ought to be alarmed, and he ought to repress that intimacy. That is part of the duty of the husband; it is one of the obligations belonging to the marriage tie. But is that obligation of being alive to the first steps of an intimacy which may lead to dishonour, subject to the terrible penalty that if the husband neglects it he shall be tied to an adulterous woman for the rest of his life? That would be a proposition of perilous latitude. He ought, no doubt, to fulfil that obligation, but is his neglect to do it the misconduct intended by the statute? I think it is not. I think that mere carelessness, the mere omission to do something here or there which ought to have been done is not sufficient to constitute misconduct. Allowance must be made for men's different dispositions. Some are very suspicious, others very confiding, some are of a very active turn of mind, others are less excitable and observant, and, although not indifferent when their feelings are touched, are less likely to take notice of what is passing about them. One man is so constituted that very small matters attract his attention and arouse his suspicion, whilst another is of a free, open, high-spirited, cheerful temperament, and does not sit brooding over every trifle that occurs. Mere carelessness, therefore, is not sufficient to constitute misconduct; if it were, very few men, probably, would go safely through the ordeal. What, then, is the meaning of misconduct? The direction I give you is this:—Before you arrive at the conclusion that the petitioner has been guilty of such misconduct as the statute condemns, you ought to be thoroughly satisfied that the intimacy between these parties was of such a character as to be distinctly dangerous, that the husband knew so much of it as to perceive the danger, and that he either purposely or recklessly disregarded it, and forbore to interfere. I have only to add, that in speaking of what the husband knew, I mean what he actually knew, and not what a more

suspicious nature or a more active vigilance might have prompted him to discover, unless indeed he should have purposely closed his eyes, which would be wilful misconduct and something more.

It is not necessary that a man should have intended any wrong, but if he saw danger, and recklessly allowed his wife to remain exposed to that danger, although without intending wrong, he would be guilty of neglect. But again, you must make allowance for the differences of mind and disposition, for one man may see danger in circumstances from which another would not draw such a conclusion.

The jury found a verdict for the petitioner on all the issues, and added that they thought he had shown great want of caution.

July 7. *Dr. Spinks* moved for a decree absolute, and for an order condemning Mr. and Mrs. Capel in the costs occasioned by their intervention.

W. G. Harrison, for *the Queen's Proctor*, opposed the motion. He referred to some affidavits which had been filed on behalf of Mr. and Mrs. Capel, for the purpose of shewing that the respondent and co-respondent, who had gone to South America together, had died of yellow fever within a few days of one another, and previous to the trial of the issues.

Searle, for Mr. and Mrs. Capel, opposed the motion for a decree. If the respondent is dead, the suit has abated, and the Court has no jurisdiction to make a decree.

[THE JUDGE ORDINARY. What harm will be done to any one by a decree being made, even if the parties are dead?]

It is sufficient to shew a want of jurisdiction. The Court will not pronounce a decree which it knows to be nugatory. As to the costs, the Court has no power to make any order as to the costs of interveners unless collusion has been proved: *Lautour* v. *The Queen's Proctor*. (1)

Dr. Spinks, in reply, suggested that the decree ought to have been pronounced immediately after the verdict, and moved for a decree nunc pro tunc.

THE JUDGE ORDINARY. I see no ground for making a decree

(1) 10 H. L. C. 685.

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nunc pro tunc. It is the practice to make decrees nisi immediately after a verdict, because before they can be made absolute, there is ample time to move for a new trial. But I should be very unwilling to make a decree absolute until after the time for an application for a new trial had expired. Some affidavits have been filed for the purpose of inducing the Court to come to the conclusion that two of the parties to the suit are dead. There is no positive, distinct evidence before the Court as to that fact. It is impossible to suggest any harm that can be done by making the decree absolute, but by withholding it the petitioner may be seriously prejudiced. I should be very reluctant to come to the conclusion that the Court has no power to condemn an intervener in the costs of an unsuccessful and improper intervention, and I hope that is not the case. But it is unnecessary to decide that question in the present case, because I think that on the merits the interveners ought not to be condemned in costs. I concur in the verdict of the jury, but the facts were such as to invite investigation, and I cannot say that Mr. and Mrs. Capel were not justified in bringing them to the notice of the Court.

Decree absolute; no order as to costs.

Proctors for petitioner: *Toller & Son.*
Attorneys for Mr. and Mrs. Capel: *Dawson, Bryan, & Dawson.*
The Queen's Proctor.

1867.
Nov. 19.

IN THE GOODS OF ANNE WARREN.

*Administration with Will annexed—Married Woman—Refusal of Husband to execute Bond—Grant to Attorney of Married Woman—*20 & 21 *Vict. c.* 77, *s.* 73.

A married woman was the only legatee of a will which contained no appointment of an executor. Her husband refused to consent to her taking the grant of administration with the will annexed, or to join in the bond. The property being left to her separate use, the Court made the grant to her attorney without the husband's consent.

ANNE WARREN, spinster, died on the 22nd of August, 1866, leaving her sister, Elizabeth Green, wife of John Green, her only next of kin. By a will of the 23rd of May, 1864, she left her

property to her sister, Mrs. Green, for her separate use, "and not to be in any way liable or subject to the influence, control, or use of her present or any future husband." No executor was named in the will. 1867 IN THE GOODS OF WARREN.

Mrs. Green had been living apart from her husband for fourteen years, and since the death of Anne Warren she had frequently applied to him, both personally and by letter, to enter into the bond, and to consent to her taking the grant of administration with the will annexed, but he had refused to do so, and it appeared from some of his letters that he wished her to allow him to take possession of half of her sister's property before he would assist her to obtain the grant.

Dr. Tristram moved for a grant of administration with the will annexed under the 73rd section of the Probate Act (20 & 21 Vict. c. 77), to John Callaway as the attorney of Mrs. Green, the legatee, and the only next of kin of the deceased.

SIR J. P. WILDE. The husband has no interest whatever in the property, and I think the proper way of meeting the difficulty is to make the grant to the attorney of the wife under the 73rd section.

Attorneys: *Duncan & Martin.*

KING *v.* GILLARD AND OTHERS. *Dec.* 3.

Practice—Costs—Defendant who had not appeared condemned in Costs.

The Court has power to condemn a party who has been cited but has not appeared, in the costs of a testamentary suit.

THE plaintiff propounded the contents of the will of J. Saunders, late of Combe St. Nicholas, in Somerset, farmer and maltster, who died in April, 1867.

The defendants, who were his children and next of kin, had been cited, but had entered no appearance. The cause was heard before the Court without a jury, on the 26th of November, 1867.

Evidence was given of the due execution of the will and of its contents, and that it was in existence when the testator died,

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KING v. GILLARD.

and was read over after his funeral, when his daughter, one of the defendants, threw it into the fire and burnt it.

THE COURT pronounced for the will.

Dr. Tristram, for the plaintiff, moved that the defendant who had destroyed the will might be condemned in costs.

Cur. adv. vult.

SIR J. P. WILDE. The question reserved by the Court was, whether it had the power to condemn the defendant who destroyed the will in costs, although she had not appeared. Following the precedent of the case of *Foster* v. *Foster* (1), where Sir J. Nicholl held that the Court had that power, I condemn the defendant in costs.

Attorney for plaintiff: *Edward F. Sealy.*

Dec. 17.

IN THE GOODS OF M'MURDO.

Seaman's Will—Will made on board the "Excellent" in Portsmouth harbour— 1 *Vict. c.* 26, *s.* 11.

A will made by a mariner serving on board H. M. S. *Excellent* whilst she was permanently stationed in Portsmouth harbour, was held to be the will of "a mariner or seaman being at sea," and within the 11th sec. of 1 Vict. c. 26.

H. R. DOUGLAS M'MURDO died on the 9th of September, 1852, leaving a will of the 8th of December, 1849, and on the 10th of March, 1857, probate of that will was granted by the Prerogative Court to Mr. Burnett, one of the executors therein named. By this will the testator left all his property, which consisted of the pay due to him at the time of his death, and of a reversionary interest under a settlement, to his father Robert M'Murdo. The executor refused to consent to a sale of the reversionary interest which Robert M'Murdo desired to effect, and a citation was thereupon taken out calling upon him to bring the probate into the Registry, and shew cause why it should not be revoked. The executor brought in the probate, but neither opposed nor consented to its

(1) 1 Add. 462.

1867

IN THE GOODS OF M'MURDO.

revocation. It appeared by the affidavits filed in support of the application for a revocation of the probate, that at the time when the will was executed the deceased was under twenty-one years of age (having been born on the 20th of May, 1830), and was a mate in her Majesty's service, serving on board the *Excellent*, which is a gunnery ship permanently stationed in Portsmouth harbour.

Miller moved that probate of the will might be revoked. The deceased was not a mariner or seaman at sea, and therefore is not within the 11th section of 1 Vict. c. 26. He cited *In the Goods of Sir Hugh Seymour* (1); *In the Goods of Lay* (2); *In the Goods of Hayes* (3); *In the Goods of Admiral Austen* (4); *In the Goods of Corby.* (5)

SIR J. P. WILDE. I think this application must be refused. The admitted facts are that the deceased was a mariner in her Majesty's service, that at the time when the will was made he was a mate on board the *Excellent*, and that the will was executed on board the *Excellent*, that vessel being at the time laid up in Portsmouth harbour, and there being no immediate intention of sending her to sea. A will made under these circumstances, in my opinion, comes within the description of the will of a mariner or seaman being at sea. I see a great distinction between this case and that of *In the Goods of Corby* (5), where the deceased wrote a letter of which probate was sought, stating that he had shipped on board a vessel lying in Melbourne harbour on the date of the letter. It did not appear whether the letter was written before or after he went on board, and the expressions which he used may have meant nothing more than that he had signed ship's articles, and had bound himself to join the vessel on a certain date. If he used the expressions with that meaning, he could not be said even to have joined the vessel in the sense of having commenced his maritime service. The cases appear to me to go this length, that where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage will be within the exception in the Act, even although such will was in fact made on shore. That was

(1) Quoted *In the Goods of Hayes*, 2 Curt. at p. 339.
(2) 2 Curt. 375.
(3) 2 Curt. 338.
(4) 2 Robert, 611.
(5) 1 Ecc. & Adm. 292.

1867

IN THE GOODS OF M'MURDO.

the case *In the Goods of Lay*. (1) The *Calliope* was lying in the harbour of Buenos Ayres, but whether she had gone there to refit, or for provisions, or for some other temporary purpose, or whether she was stationed there, does not appear. But she was actually in the harbour at the time of the making of the will, and the will was in fact made on shore. In the case of *Austen* the will was made whilst the admiral was engaged on an expedition up a river, when although he was not actually at sea, he was practically on maritime service, which he had commenced by going to sea. It seems to me impossible to draw a distinction for this purpose between the *Calliope* lying in Buenos Ayres harbour and the *Excellent* lying in Portsmouth harbour. Although a seaman on board the *Excellent* is not in a foreign country, still he is subject to the restraints of the service, and might have no opportunity of making a will with the usual formalities if he was taken ill on board when no lawyer was at hand.

Motion rejected.

Attorney: *S. F. Noyes.*

1868
Jan. 11.

LEEMAN *v.* GEORGE AND ROSSER.

Costs—Notice under Rule 41—*Conditional Notice.*

Post 657.
PD 23 q.

A conditional notice, that if both the attesting witnesses to a will are produced the parties opposing it only intend to cross-examine the witnesses, is a sufficient notice to protect them against condemnation in costs under Contentious Rule 41.

THE plaintiff propounded a will, dated the 11th of January, 1867, of Henry William Tyler, deceased. The defendant J. G. George was an executor, and the defendant C. A. Rosser was one of the residuary legatees of a previous will of the deceased, dated the 1st of September, 1857. They pleaded undue execution and incapacity, and with their pleas delivered the following notice:—"Take notice that the defendants merely insist upon the will being proved in solemn form of law by the production of the attesting witnesses, and that if both such witnesses be produced, they only intend to cross-examine the witnesses produced in support of the will."

After hearing the evidence produced by the plaintiff, including that of the two attesting witnesses,

THE COURT pronounced for the will.

(1) 2 Curt. 375.

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Dr. Deane, Q.C. (*Dr. Swabey* with him), for the plaintiff, moved that the defendants might be condemned in costs. The notice is a conditional one, and does not entitle the defendants to the protection of Rule 41. The defendant Rosser, as a residuary legatee, is not, according to the practice, protected by the notice.

[SIR J. P. WILDE. Has the plaintiff been put to any additional expense by Mr. Rosser's intervention in the suit?]

Dr. Deane said he had not.

Dr. Middleton (*Bayford* with him), for the defendants, referred to Rule 5. Next of kin and executors of previous wills, are entitled to have both the attesting witnesses examined: *Croft* v. *Day*. (1)

SIR J. P. WILDE. I think the notice brings the defendants within the protection of Rule 41. If it had not done so, I should certainly have condemned them in costs, for I think there was no reasonable ground for the litigation.

Attorneys for plaintiff: *Jones & Starling.*

Proctors for defendants: *Rothery & Co.*

IN THE GOODS OF ANN CADGE.

Jan. 14.

Will—Construction—Words carrying the Residue—Interlineations—Presumption.

The words "What is left, my books and furniture and all other things, I wish to be equally divided amongst the three children," held sufficient to carry the residue.

A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether the interlineations were there or not. The Court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate.

ANN CADGE, widow, died on the 23rd of October, 1867, leaving a sister, Mary Barnes, her only next of kin, and a nephew and two nieces, the surviving children of a deceased brother, James Tuck, who with Mrs. Barnes were the only persons entitled in

(1) 1 Curt. 782.

1868

IN THE GOODS OF CADGE.

distribution if she were intestate. On the 11th of June, 1867, she duly executed a holograph will, by which she gave 700*l.* to her nephew, and 200*l.* to each of her nieces. The concluding words of the will were as follows, the words printed in italics being interlined:—"To my sister-in-law, Sarah Tuck, widow of my late brother, I give my body *linen* and wearing apparel. What is left, my books and furniture and all other things, I wish to be equally divided *amongst the three children.* If I am buried here or elsewhere, I wish to have a gravestone erected to my memory."

It appeared on the face of the will that the testatrix was an illiterate person, and there were several single words interlined besides those contained in the above sentences. No executor was appointed. Margaret Smith, one of the attesting witnesses, made an affidavit stating that at the time of the execution of the will the testatrix placed a sheet of paper over the writing, so that she and the other witnesses were unable to say whether the interlineations were then there. It was also proved by affidavit that the testatrix was not on friendly terms with her sister, Mrs. Barnes, and that for many years before her death she had lived with Mrs. Tuck, her brother's widow, and was on affectionate terms with her brother's three children, and had declared her intention of leaving the principal part of her property to those children, and of leaving nothing to her sister or her sister's children.

Dr. Middleton moved for a grant of administration, with the will annexed, including the interlineations, to Mrs. Tuck, as guardian of her children, the residuary legatees named in the will. The words "all other things" are sufficient to carry the residue. With regard to the interlineations, the presumption that they were not made until after execution does not apply, because each of them is required to complete and make sense of the sentences. In the absence of direct evidence, the Court will not presume that they were made after execution, for they do not indicate any change of intention on the part of the testatrix: *In the Goods of A. Swinden.* (1)

SIR J. P. WILDE. I am of opinion that the words used by the testatrix are sufficient to dispose of the residue of her estate.

(1) 2 Rob. 192.

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IN THE GOODS OF CADGE.

As to the other question, I think there is a marked distinction between interlineations and alterations. Interlineations are generally used merely to complete an imperfect sentence, whilst an alteration is a change in the original disposition. Several single words are interlined in this will without which the sentences to which they belong would be incomplete; for instance, "I leave to my sister-in-law my body *linen*." In the bequest of the residue the interlined words *amongst the three children* are required to make the sentence intelligible. All the interlineations are apparently written with the same ink and at the same time as the rest of the will. Taking these circumstances into consideration, is the Court at liberty to presume that they were made before the execution? *Cooper* v. *Bockett* (1) decided that as a general rule in the absence of evidence, unattested alterations and interlineations must be presumed to have been made after execution. I think that in this case, however, I am not bound to draw that presumption. For I conceive that the Court is not precluded by the absence of direct evidence of the fact from considering the nature of the interlineations and the internal evidence, if any, furnished by the document itself. In the case of *Swinden* (2), Dr. Lushington admitted words which interfered with the grammatical structure of a paragraph in the will, and in *Birch* v. *Birch* (3), Sir H. Jenner included in the probate some interlineations made in filling up blanks which had been left when the will was originally drawn. There must be numerous cases in which interlineations were on the will at the time of execution, although no direct or positive evidence can be produced to prove when they were written. Administration with the will annexed, including the interlineations in the body of the will, will be granted to Mrs. Tuck as the mother and guardian of the residuary legatees.

Proctors: *Toller & Sons.*

(1) 4 Moo. P. C. 419. (2) 2 Rob. 192. (3) 1 Rob. 675.

1868
June 23.

JOHNSON *v.* LYFORD.

Evidence—Lost Will—Proof of Contents—Declaration of Testator.

The verbal and written declarations or statements made by a testator in and about the making of his will when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will.

A testator wrote out a will in the presence of M., and read it aloud to him, and gave him a paper enclosed in an envelope, which he stated was a copy of the will. On the same evening he wrote a letter to M. stating that he had executed the will and had appointed him executor. It was proved that a will was executed by the testator about that time. The will could not be found at his death, and it was held that the declarations of the testator at the time when he made the will and the letter written by him, were admissible as evidence of its contents.

The plaintiff propounded as executor a will of the 22nd of June, 1840, made by the Rev. Charles Lyford, who died on the 29th of July, 1867. The defendant, one of the deceased's next of kin, alleged that the will propounded was revoked by a subsequent will of the 3rd of January, 1863, and that the will of the 3rd of January, 1863, was destroyed by the deceased animo revocandi, and set up an intestacy. The cause was tried on the 24th of April, 1868, by Sir J. P. Wilde, without a jury.

The will of the 3rd of January, 1863, could not be found at the death of the testator, and the question in the case was whether the declarations of the testator as to the contents of the will were admissible in evidence. The circumstances under which the question was raised are stated in the judgment.

Dr. Spinks, Q.C., and *Dr. Swabey*, for the plaintiff. The declarations are inadmissible on the authority of *Quick* v. *Quick*. (1) But if admissible at all they can be received only as evidence of the testator's intention, not as evidence of the fact of execution or of the contents of the document. They also cited *Staines* v. *Stewart*. (2)

A. Staveley Hill, Q.C., and *Searle*, for the defendant. The declarations are admissible because they are contemporaneous with the act of execution. That is the distinction between this

(1) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146.

(2) 2 Sw. & Tr. 320; 31 L. J. (P. M. & A.) 10.

case and those cited on the other side: *Doe dem Shallcross* v. *Palmer* (1); *In the Goods of Ripley.* (2)

Cur. adv. vult.

SIR J. P. WILDE. Charles Lyford made his will on the 22nd of June, 1840. About the month of January, 1863, he made another will. On the 29th of July, 1867, he died. After his death due search was made for the will of 1863, which, so far as the evidence goes, he had kept in his own possession, but it was not to be found. The practical question in this suit is whether there is sufficient legal evidence as to the contents of this second will. It was proved by Mr. Morey that, on the 3rd of January, 1863, the testator was in his house; that he was writing a great deal; that Mr. Morey was in and out of the room; that the testator told him he was making his will; that he read the will out loud to him; that he handed him an envelope which he said contained a copy of it, and which he wished Mr. Morey to take care of; finally, that he left the house saying that he meant to execute the will on his way home that evening at Mr. Masters', the publisher's.

That he did execute a will at Mr. Masters', the publisher, about that time, was distinctly proved by the two witnesses to it who were in Mr. Masters' employ, and if the Court is at liberty to receive in evidence the above verbal statements of the testator as to his will and intentions respecting the execution of it, there can be no difficulty in arriving at the conclusion that the copy given to Mr. Morey contains the substance of the will which he executed at Mr. Masters'.

But it is contended that these verbal statements of the testator are not admissible in evidence, and the case of *Quick* v. *Quick* (3) with some others were cited.

I am of opinion that the evidence was admissible. The verbal declarations or statements made by a testator in and about the making of his will when accompanying acts done by him in relation to that subject, fall within a well-known principle of the general law of evidence, and have always been admitted, though not made on oath. It would often be impracticable to judge of

(1) 16 Q. B. 747. (2) 1 Sw. & Tr. 68.
(3) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146.

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the quality and nature of acts done, if the statements of the person doing them immediately preceding or accompanying those acts were excluded from view. Suppose the will, instead of being executed at Mr. Masters', had been executed in an adjoining room at Mr. Morey's in presence of witnesses, but in the absence of Mr. Morey himself, could it be contended that the previous conversation with Mr. Morey would have been excluded? There would no doubt in such a case be no positive proof that the will of which the testator had been talking to Mr. Morey in one room, was the same will that he executed before two other witnesses in the next room; but to exclude the evidence of what had taken place, would be to preclude the Court from judging whether it was so or not. A further piece of evidence was tendered in the form of a letter written by the testator to Mr. Morey a day or two after the 3rd of January, saying that he had made his will, and appointed Mr. Morey executor, an office which he begged him to accept. (1) There is sufficient evidence, as I have already said, to establish the contents of the will without this letter, but if not, the letter was in my judgment also admissible, in so far at any rate, as related to the fact of his having appointed an executor, and the request that Mr. Morey would consent to fill that office. For this too was in the nature of an act done by the testator, and a declaration accompanying it. The Court, therefore, holds the contents of the will of January, 1863, to have been proved, and it appears from those contents that it revoked all former wills. The consequences of this state of things are most unsatisfactory, for as the will of 1863, which had revoked all former wills, was not to be found after the testator's death, the law presumes that it was itself also revoked by the testator, and the Court is constrained to pronounce for an intestacy. So long as the law thus permits wills solemnly executed to be revoked by the presumptions arising from their disappearance, and so long as the law forbears to prescribe any definite place of deposit for a man's will, the real and true intentions of testators

(1) The letter was as follows:—"MY DEAR MOREY,—After leaving you I went to Masters, where I duly signed my will in the presence of Mr. Wakeling and Mr. Brown, who also signed as witnesses. I have taken the liberty of putting you and your wife in as my executors. You will, I hope, excuse my making use of you. The will will be found in a cupboard in my room nearest to the window."

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will in many cases be open to frustration by accident or design. It may have been so in this case, though there is no evidence to throw the slightest suspicion of misconduct upon anybody in relation to it.

Still, such cases as this bring forcibly to light the jeopardy in which all wills stand which are not deposited where they are sure to be found, and safe from the possibility of foul play. There was no reason in this case to suppose that the deceased designed to alter or suppress the will of 1863, and in all probability it has failed to take effect through some mischance from which a more careful custody would have protected it.

While the law remains in its present state as to revocation by destruction, the custody of a will is as important as its due execution, and no pains should be spared to secure it.

On the motion of *Dr. Swabey* for the plaintiff, and of *Searle* for the defendant,

THE COURT ordered the costs of both parties to be paid out of the estate.

Attorney for plaintiff: *Cookson.*

Attorneys for defendant: *Smith & Fawdon.*

PARTON AND PAGE *v.* JOHNSON; JOHNSON AND BILLS INTERVENING. *July 6.*

Pleading—Interveners—Right to propound Will.

An executor propounding a will cannot plead in opposition to an earlier will propounded in the same suit any plea but revocation by the will which he propounds. A party who has no interest under a will cannot propound it.

A. propounded as executor a will of March, 1867. B., as interested under a will of October, 1865, pleaded in opposition to it, but did not propound the will of October, 1865. C. intervened as interested under a will of January, 1858, and pleaded in opposition to the will of March, 1867. C. also propounded the will of January, 1858. A. was not allowed to plead to C.'s declaration that the will of January, 1858, was not duly executed, nor that it was revoked by the will of October, 1865. Nor was A. allowed to propound the will of October, 1865.

THE plaintiffs propounded as executors a will of Charles Johnson, dated the 25th of March, 1867.

The defendant, who was the niece and the next of kin of the

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deceased, entered an appearance as interested under a will of the 25th of October, 1865. The executor and residuary legatee named in the will having died in the lifetime of the testator, the residue lapsed to the defendant as next of kin. The only other legatee named in the will was also dead, intestate, and the defendant was her next of kin. The defendant did not propound the will of October, 1865, but she pleaded in opposition to the will of March, 1867, first, that it was not duly executed; secondly, incapacity.

After the record had been deposited and the cause set down for trial before the Court without a jury, Johnson and Bills obtained leave to intervene as executors of a will of the 18th of January, 1858. They pleaded to the plaintiffs' declaration, first, that the will of the 25th of March, 1867, was not duly executed; secondly, incapacity; thirdly, that the will was obtained by undue influence and fraud. They also filed a declaration propounding the will of the 18th of January, 1858. Each of the wills in substance revoked all former wills.

The plaintiffs took out a summons for an order for leave to plead the following pleas to the interveners' declaration: first, that the will of the 18th of January, 1858, was not duly executed; secondly, that it was revoked by the will of the 25th of October, 1865; thirdly, that it was revoked by the will of the 25th of March, 1867.

June 16. *Searle*, for the interveners, objected to the proposed first and second pleas. If the will of March, 1867, is pronounced against, the plaintiffs have no interest, and they are not entitled to oppose the will of January, 1858. If, on the other hand, the will of March, 1867, is pronounced for, the question as to the validity of the will of January, 1858, will not arise. The validity or invalidity of the will of March, 1867, must be determined before the will of 1858 can be questioned, and the plaintiffs have no right to question the validity of the will of 1858 except on the ground of its revocation by the subsequent will of which they are executors.

June 18. SIR J. P. WILDE (in chambers). I think the pro-

posed first and second pleas ought not to be allowed. When several wills are propounded, it would be extremely inconvenient to try the validity of the earlier wills before the validity of the will latest in date is decided. The validity of the latest will should be determined in the first instance, and the plaintiffs who have no interest except as executors under that will ought not to be allowed to plead in opposition to the earlier will. What interest have the plaintiffs to justify their pleading to the will of 1858? It is said that they have this interest, that if they can defeat it they will defeat the locus standi of the interveners to oppose the will of 1867. This is true. But a little reflection will make it clear that when there are several parties, each setting up wills, the locus standi of some must be assumed or proved before the validity of others can be tried. When the locus standi or interest depends on matters independent of the wills themselves, it must be admitted or proved as a preliminary. But when it depends on one of the wills propounded it cannot be proved as a preliminary. For instance, if one person propounds a will of 1867 and another person a will of 1858, and neither have any interest in opposing the other except what is created by the will they propound, how is preliminary proof to be made of their interests or locus standi except by trying the validity of the two wills? And yet, to try that validity, the right to take part in the controversy must be conceded.

The defendant did not plead to the interveners' declaration, and when the plaintiffs applied by summons for leave to deliver the issue, she appeared on the summons and stated that she did not intend to plead.

July 6. *Bayford*, for the plaintiffs, moved for leave to propound the will of October, 1865, the defendant, who was interested under that will, having declined to propound it. An intervener has no right to contest a will unless he can prove that he has an interest. If the will of 1865 is valid the interveners have no interest, and the plaintiffs are entitled to put them on proof of their interest by propounding the will of 1865. That will is a valid will on the face of it, and the Court could not pass it over in favour of an earlier will without an inquiry into its validity. The persons

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interested under it having declined to uphold it, the plaintiffs should be allowed to propound it.

Searle opposed the motion.

SIR J. P. WILDE. I am of opinion that this application must be refused. The plaintiffs cannot possibly have an interest in propounding the will of 1865. It is suggested that unless they are allowed to propound it, the will of 1858 may be improperly established for want of an opponent. If, indeed, there is a valid will in existence which revokes the will of 1858, it would be a misfortune that the will of 1858 should be admitted to probate, but it is a misfortune which necessarily attends proceedings of this character, and it would be occasioned by the refusal of the next of kin, who are the only persons interested in opposing the will of 1858, to come forward and establish the will which revokes it. They act with their eyes open, and they must be presumed to know their own interest. It may be that the will which purports to revoke it is not duly executed, or that it is invalid on some other ground. It is not for the Court to speculate on the reasons which induce the next of kin to abstain from propounding the will. It is enough to say that they being the sole persons interested in propounding it, no other person can be allowed to propound it.

Motion rejected.

Proctor for plaintiffs: *Jennings.*

Attorneys for interveners: *Redpath & Holdsworth.*

THOMPSON *v.* THOMPSON AND JOHNSON.
BURROWS *v.* BURROWS.
GEORGE *v.* GEORGE.

1867
Nov. 27.

Alimony.

Alimony will be allotted on the average annual earnings of a husband, although at the moment when his answer to the petition for alimony is sworn he may be temporarily out of employment.

Where the husband and wife have been living apart for many years before the institution of the suit, and the wife has supported herself during the separation and is still able to do so, alimony pendente lite will not be allotted.

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IN a suit by a husband for dissolution of marriage, the wife having filed an answer presented a petition for alimony pendente lite. The husband, in his answer (dated the 11th of December, 1867), to the petition, alleged: "When in employment I earn as a master mariner 144*l.* per annum, and no more; but I have been out of employment ever since the 25th of September last, and have no present prospect of obtaining any employment in consequence of the shipping trade being at the present time in a very depressed state. I am not half owner of the ship or barque *Jamaica*, but I own one fourth part of the said vessel, and the market value of such fourth part at the present time is at most 500*l.*"

Bridgman moved for an allotment of alimony.

Searle. The husband at present has no income, and therefore no alimony can be allotted. As soon as the husband obtains employment the wife can come to the Court and obtain an order.

THE JUDGE ORDINARY. The Court looks to the average earnings of the husband for the last few years, and it assumes that in the current year his earnings will be about the same rate. It may happen that a man's income may not be derived from identically the same sources in the current year or in future years as in past years, but in ordinary life an income of about the same amount is generally derived from similar sources. In the case, for

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instance, of a professional income, a medical man may be presumed to derive as large an income in future years as in past, although not from the same patients. In a case like the present, a master mariner may be able to swear that he was not at the date of his answer in command of any vessel, but the Court may reasonably presume that in the ordinary course of events he will soon obtain a command. Looking at the nature of his calling and the amount he has been in the habit of earning, I shall estimate his income at 160*l.*, and allot his wife 32*l.* a year.

Attorney for petitioner: *R. W. Roberts.*
Attorney for respondent: *W. W. Wynne.*

BURROWS v. BURROWS.

BURROWS v. BURROWS.

THIS was an application for alimony pendente lite in a suit by a wife for judicial separation on the grounds of adultery and cruelty. The answer of the husband to the petition for alimony admitted an income of 200*l.* a year derived from his business as a dentist, but alleged that the wife was able to support herself. The wife admitted that she lived with her son and acted as his housekeeper, and that he allowed her 30*l.* a year. The parties had been living separate for many years.

Searle moved for an allotment of alimony pendente lite.
Dr. Tristram opposed the motion.

THE JUDGE ORDINARY refused to make an order.

Attorney for petitioner: *Rigby.*
Attorney for respondent: *J. Hall.*

GEORGE v. GEORGE.

GEORGE v. GEORGE.

6 P.D. 99

THE husband was a contractor with a net annual income of 225*l.* He had for several years been living apart from his wife, and she was in service and received 14*l.* a year wages, besides being provided with board and lodging. She instituted a suit for dissolution of marriage, and filed a petition for alimony pendente lite. The husband in his answer to the petition set out the above facts.

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GEORGE v. GEORGE.

Inderwick moved for an allotment of alimony.
Pritchard opposed the motion.

THE JUDGE ORDINARY. The wife is able to support herself by means of her own exertions, and she has long lived apart from her husband without an allowance. If I were to allot alimony, I should be placing her in a better position than she was in before she instituted this suit. I shall therefore make no order for alimony.

Attorneys for petitioner: *Bower & Cotton.*
Attorney for respondent: *W. Shearman.*

IN THE GOODS OF ELIZABETH JORDAN.

1868
Jan. 21.

Will disposing of Realty only—Appointment of Executor—Renunciation of Executor—Grant of Administration with Will annexed.

A will disposing of realty only, but containing an appointment of an executor, is entitled to probate notwithstanding the renunciation of the executor.

ELIZABETH JORDAN died on the 21st of July, 1867, leaving a will disposing of realty only. The will contained an appointment of an executor who had duly renounced probate.

Pritchard moved for a grant of administration with the will annexed to the next of kin. The deceased did not die intestate, and the executor would have been entitled to probate if he had applied for it. The Court cannot, therefore, make a grant of administration as in a case of intestacy. The subsequent renunciation of the executor cannot have the effect of making the deceased intestate. The 79th section of the 20 and 21 Vict. c. 77, which enacts that where an executor renounces probate the rights of such person in respect of the executorship shall wholly cease, does not affect the question, as it merely gets rid of the renouncing executor. He referred to Williams on Executors, part 1, book 3; *Androvin* v. *Poilblanc* (1); *O'Dwyer* v. *Geare* (2); *In the Goods of Noddings.* (3)

SIR J. P. WILDE. I think the next of kin is entitled to the

(1) 3 Atk. 804.
(2) 1 Sw. & Tr. 465; 29 L. J. (P. M. & A.) 47.
(3) 2 Sw. & Tr. 15.

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grant. The general principle is laid down in Williams on Executors. (1) "The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved." If the nomination of the executor made it a will, the fact of his subsequent renunciation cannot take away the effect of the nomination. The principle laid down by Mr. Justice Williams was affirmed by Sir C. Cresswell in *O'Dwyer* v. *Geare*. (2) The 79th section of the 20 & 21 Vict. c. 77 merely affects the right of the person entitled to the grant. The next of kin is entitled to administration with the will annexed.

Proctors: *Pritchard & Englefield.*

Jan. 23.

IN THE GOODS OF MARTHA WOODS.

Appointment of Executors—Executors not named in Will.

A testatrix executed a will containing these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided," but not naming any executor. Beneath the signature of the testatrix, and opposite the names of the attesting witnesses, were the words "executors and witnesses."

The Court held that there was no appointment of executors.

MARTHA WOODS died on the 13th of November, 1867, leaving a will of the 28th of October, 1867. The will contained no appointment of an executor, except in the last clause, which was as follows: "I now leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is divided justly between them" (the two sons of the testatrix, to whom she left her property). The signature of the testatrix and the date of execution followed this clause, and underneath the signature was the attestation of the witnesses as follows:—

"Albert Jackson Prestage, Guy's Cottage, Nelson Street, Bermondsey; Daniel Joseph Doherty, 24, Little George Street, Bermondsey; } Witnesses and Executors."

(1) Part 1, book 3, p. 218 of 6th ed.
(2) 1 Sw. & Tr. 465; 29 L. J. (P. M. & A.) 47.

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IN THE GOODS OF WOODS.

It appeared from an affidavit made by Doherty that the deceased had declared her intention of appointing him and Prestage executors on more than one occasion previous to the making of the will, and that the words "witnesses and executors" were written by Prestage, at the request of the deceased, just before the will was executed, and that she intended them to form part of her will.

Dr. Spinks, Q.C., moved for a grant of probate to Prestage and Doherty as executors according to the tenor. The Court is at liberty to take notice of the words beneath the signature for the purpose of explaining the ambiguity in the body of the will.

SIR J. P. WILDE. If the executrix had said in the body of the will that the witnesses to the will were to be her executors, I think the Court would have been able to carry out what was, no doubt, her desire, and to grant probate to them; but she has not gone so far. Even if she had said "I leave one sovereign each to the executors and witnesses of my will," it might perhaps have been sufficient; but it is consistent with the language she has used that the executor and the witness were different persons, and that construction is confirmed by the words which follow, "for their trouble." If the executor and the witness were the same person, the words would have been, "for his trouble." I cannot therefore hold that there is any appointment of executor in the body of the will. The Court is not at liberty to take notice of the words beneath the signature, which do not form part of the will.

Motion rejected.

Attorney: *Walter Butler.*

1868
Feb. 25.

ARCHER *v.* BURKE.

Costs—Alteration of Pleading—Discontinuance of Contentious Proceedings.

A plaintiff propounded a will in a declaration in the ordinary form, to which the defendant pleaded. The plaintiff then filed a second declaration in a special form, propounding the will as an American will. To this declaration the defendant pleaded, and evidence was taken on the questions raised by the pleadings under a requisition and commissions in America. Before the case came on for trial, the plaintiff amended his declaration by reverting to the case which he had originally set up, whereupon the defendant abandoned his opposition and consented to probate.

The Court condemned the defendant in the costs of proving the will in solemn form, as if the suit had proceeded upon the original declaration, and made no order as to the costs caused by the filing of the second declaration.

The plaintiff propounded a will, dated the 24th of March, 1865, of Joseph Burke, deceased, in a declaration in the ordinary form, as the will of a British subject. The defendant, a brother of the deceased, pleaded to this declaration, and the plaintiff demurred and replied. An order was subsequently made by consent, that the plaintiff should file another declaration. This declaration was special in form, and alleged that the will was executed according to the laws of the state of New York; that the deceased was domiciled in the state of New York; that the will was valid according to the law of the said state; and that it had been duly proved in the American court, in a suit in which the defendant had been cited and had appeared; and that the judgment and decree of the court in the suit was conclusive. The defendant pleaded, traversing all the facts alleged in this declaration. A requisition and commissions were issued, under which a great deal of evidence was taken in America, and the evidence so taken was returned into the registry in Easter Term, 1867. On the 4th of February, 1868, the plaintiff obtained the leave of the Court to add to his declaration the words, "that the said Joseph Burke was a British subject, and had his domicile of origin in Ireland." The defendant thereupon consented to an order for the discontinuance of contentious proceedings, the case being within the 24 & 25 Vict. c. 114. The case came before the Court upon the question of costs on the 18th of February.

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Dr. Spinks, Q.C., was for the plaintiff, and *Dr. Swabey* for the defendant.

Feb. 25. SIR J. P. WILDE, after stating the facts, said:—The result of the proceedings is, that a great deal of money has been unnecessarily thrown away. It now appears that the will is clearly entitled to probate, and the defendant ought never to have contested it, having no reasonable ground for so doing. He must, therefore, be condemned in the costs, save and except the costs of what I may call the American digression. He will only pay what costs he would have paid if the suit had gone on as originally instituted, upon the declaration as it was at first filed. From the point at which the plaintiff diverged and set up the will as an American will, the defendant will pay no costs. It may be that the will was good as an American will, and that the plaintiff would have succeeded upon his amended declaration; but as he chose to abandon that declaration, and revert to the case he had originally set up, the Court cannot hold that either party was right or wrong on that issue. I can make no order as to these costs. The defendant is condemned in the costs of proving the due execution of the will and the capacity of the testator, whether incurred in America or in this country, but not in the costs arising from the plaintiff's second declaration.

Proctor for plaintiff: *A. Ayrton.*
Attorneys for defendant: *Bridges, Sawtell, Heywood, & Ram.*

A. *v.* B. AND ANOTHER.

July 7.

Impotence—Nullity of Marriage—Suit after Death of one of the Parties to Marriage—Administration to Husband of Intestate.

1 P.D. 405
6 P.D. 15

The validity of a marriage cannot be impeached, on the ground of impotence, after the death of one of the parties.

The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband.

THIS was an administration suit, the plaintiff claiming the grant as the husband of the intestate, and the defendants claiming it as her mother and brother. The defendants filed an act on petition,

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alleging: 1. That on or about the 8th day of June 1854, a ceremony of marriage was performed between the plaintiff A. and the intestate E. S., spinster. 2. That such ceremony of marriage was and is null and void in law, for that the said A. did not, and was unable, by reason of the incurable frigidity or malformation of his parts of generation, to consummate the said pretended marriage during the lifetime of the said E. S. 3. That there was not at the date of the said pretended marriage, nor during the lifetime of the said E. S., any hindrance on her part to the consummation of the said pretended marriage. 4. That the said E. S. died on or about the 26th day of February, 1868, intestate, a spinster without a father, leaving her surviving her natural and lawful mother and brother (the defendants), and sisters. The plaintiff demurred.

June 16. *Searle*, for the plaintiff. There is no precedent for allowing the validity of a marriage to be questioned on the ground of impotence after the death of one of the parties. It would be contrary to all the dicta of judges and of text writers who have considered the matter, to allow such a question to be raised. He cited Williams on Executors, c. 2, s. 1 (1); *Elliott* v. *Gurr*. (2)

Jones, Q.C. and *Dr. Swabey*, for the defendants. There is no decision upon the question raised by these pleadings, and on principle it would seem that an impediment of the kind alleged, renders a marriage absolutely void. If that is the case, its validity may be questioned at any time and in any court. They cited Swinton's Justiciary Rep. (Scotland), 427; *Browning* v. *Reane* (3); *Pride* v. *The Earls of Bath and Montague* (4); *Cavell* v. *Prince* (5); Fraser on Personal and Domestic Relations; Shelford on Marriage, p. 483; Huber de Nuptiis, tit. 10, S. 1.

Searle was not called on for a reply.

July 7. Sir J. P. Wilde. The defendants who are the next of kin of the deceased, have filed an act on petition, claiming the administration to the estate on the ground that, although she died married to the plaintiff for fourteen years, yet that the marriage was in truth void, on account of the plaintiff's impotence.

(1) Page 395 of 6th edit.
(2) 2 Phillim. 16.
(3) 2 Phillim. 69.
(4) 1 Salk. 120.
(5) 4 H. & C. 368.

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These pleadings disclose a great novelty, an attempt to question a marriage as void on the ground of impotency after the death of one of the parties, and that too in a collateral matter arising in the Probate Court.

I will deal with this last difficulty first. It may be safely asserted that the question of impotency as a ground of nullity, has never yet been raised in the temporal courts of this country. The various restrictions on marriage, such as a prior existing marriage, insanity, illegality under the Marriage Acts, illegality under the Royal Marriage Act, and, since Lord Lyndhurst's Act, consanguinity or affinity, all these matters, when they arise incidentally in the temporal courts, have in modern times been there dealt with for the purposes of the suit in which they have arisen. In older times all questions of marriage were relegated to the ecclesiastical authorities. Upon the old plea of ne unques accouple in an action for dower, the validity of the controverted marriage used always to be determined by the bishop's certificate. The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal courts in which they may chance to arise. Though at the same time a suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical courts or the Divorce Court alone. How then, it may be asked, does it happen that the particular ground of nullity which is raised incidentally in this suit has not followed the fate of all other grounds of nullity, and become cognizable in the temporal courts? The answer is, that impotence does not render a marriage "void," but only "voidable." And this brings me to the second objection—namely, that this matter can only be discussed and adjudicated in the lifetime of the parties.

The distinction between "void" and "voidable" is not a mere refinement, but expresses a real difference in substance. This real difference is well known and perfectly recognized at common law with regard to many contracts in respect of which it is held

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that the injured party may treat the contract as void or not, at his option. This is notably the case in some instances of fraud, and it is this option to hold to the contract or annul it which is the distinguishing feature of a contract "voidable" as compared with a contract intrinsically "void." Questions of this kind arise most commonly when the rights of third parties have become involved. Now, it is obvious enough that this matter of impotence is one which ought to be raised only by the party who suffers an injury from it, and who elects to make it a ground for asking that the contract of marriage should be annulled. For although it has been said that the procreation of children is one main object of marriage, yet it cannot be doubted that marriages between persons so advanced in years as effectually and certainly to defeat that object, are perfectly legal and binding. The truth is, consensus non concubitus facit matrimonium. In all cases in which the incapacity to marriage is one in which society has an interest and which rests on grounds of public policy, it would be wrong and illogical that validity or invalidity should depend upon the option of the parties, and in all such cases the marriage is absolutely "void" and not "voidable" only. But impotency has always hitherto been considered in the ecclesiastical courts (and since their abolition in the Divorce and Matrimonial Court), as a matter of personal complaint only. I do not find the principle of the Court's interference to annul such a marriage anywhere distinctly set forth. Its original exercise was, it is likely enough, mixed up with the interests of those who asserted the jurisdiction. But I conceive that it has a sound basis of justice in the consideration that the party complaining was, though perhaps unintentionally, deceived in the contract, and ought not to be bound by it. On whatever ground it is rested—this much, at least, is clear—that it has been and is always dealt with as a matter of personal complaint and grievance; and that it has been so dealt with is apparent from the fact that the Courts have been in the habit of requiring many conditions to be fulfilled before they would grant relief, all of which are inconsistent with the notion that the marriage is absolutely void. Thus the party complaining must be sincere in the ground on which he is asking relief; there must be no unreasonable delay, and the defect must be incurable.

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I must here take leave to point out that a contrary system would give rise to some almost intolerable results. The question whether two people are married or not may arise on a great variety of occasions and be raised by third persons, as creditors or otherwise. Now, if the parties themselves in a case of impotency, are content with the consortium vitæ, and prefer to maintain the bond of matrimony intact, would it not be almost intolerable that a third person should have the right to insist upon an inquiry into the nature of their cohabitation and the revelation of their physical defects? With this observation I will quit the subject.

It has been endeavoured, in the above remarks, to vindicate the propriety of confining the question of impotency, as a ground for annulling a marriage, to a suit brought by one of the parties to the marriage in the Matrimonial Court. Whether I am justified or not in these views, this much is clear,—that the practice of the courts, both temporal and spiritual, from all time, has been inconsistent with the attempt now made, and that it is not supported by a single authority. The Court therefore pronounces the contention of the defendants to have wholly failed, and it overrules the act on petition, and grants administration to the plaintiff, with costs.

Judgment for the plaintiff.

Attorneys for plaintiff: *Turnley & Co.*
Attorney for defendants: *F. S. Gosling.*

BLACKBORNE *v.* BLACKBORNE.

May 22; *June* 2.

Suit for Restitution—Answer charging Adultery and praying for Judicial Separation—Evidence of Parties—Decree—6 *&* 7 *Vict. c.* 85—14 *&* 15 *Vict. c.* 99, *ss.* 2 *and* 4.

A petition for restitution of conjugal rights, to which an answer has been filed charging adultery and praying for a judicial separation, is not a suit or proceeding "instituted in consequence of adultery," and therefore the evidence of the parties is admissible.

When an answer to a petition for restitution of conjugal rights contains a prayer for judicial separation, the respondent has a right to proceed and prove the allegations in the answer on which the prayer is founded, notwithstanding the withdrawal of the prayer for restitution by the petitioner.

A respondent in a suit for restitution of conjugal rights, who alleged adultery

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of the petitioner and prayed for a judicial separation, was examined in support of the charge of adultery, and a jury found that the petitioner was guilty of adultery. A decree of judicial separation was pronounced on that verdict.

THIS was a petition by a husband for restitution of conjugal rights. The respondent, in her answer, charged the petitioner with adultery, and prayed for a judicial separation. The petitioner, by his replication, denied the charge, and issue having been joined, the cause came on for trial before the Judge Ordinary by a special jury.

Before the jury were sworn,

Hawkins, Q.C. (*Ballantine, Serjt., Day,* and *H. James,* with him), for the petitioner. The petitioner does not wish to proceed with his suit for restitution. It is therefore unnecessary to swear the jury, as there is no issue to be tried.

Dr. Spinks, Q.C. (*Searle* and *R. J. Shee* with him), for the respondent. The petitioner is not at liberty to abandon his petition without the leave of the Court. The respondent is entitled to insist on a verdict on the charge of adultery on which issue has been joined, and to claim the decree for which she prays in her answer. She might have set the cause down for trial if he had not done so.

THE JUDGE ORDINARY. I am of opinion that the petitioner is not at liberty to withdraw his petition at this stage of the proceedings, and that the cause must proceed. It frequently happens that a suit is brought before the Court in such a form that both parties—the petitioner and the respondent—can make their respective claims for a decree in the petition and the answer. If the petitioner chooses to abandon his prayer, that is no reason why the respondent should not be allowed to proceed and prove her answer, and substantiate her claim to the decree for which she prays.

The jury were sworn, and no evidence being produced on behalf of the petitioner, the respondent's case was opened, and witnesses were called to prove the marriage and the adultery.

The respondent, Mrs. Blackborne, was tendered as a witness.

Day, and *H. James*, objected to the admission of her evidence. This is a proceeding by Mrs. Blackborne for judicial separation on the ground of adultery. It therefore comes within the exception which excludes the evidence of parties. (1) In *Burroughs* v. *Burroughs* (2) Sir C. Cresswell refused a decree of judicial separation, because the parties had been examined in the suit.

Dr. Spinks and *Searle*. This is a suit for restitution, and it is not therefore a suit instituted on the ground of adultery. The evidence being admissible, the Court is bound to receive it for all purposes, and the decision in *Burroughs* v. *Burroughs* (2) should be reconsidered. But on the question of the admissibility of the evidence, which is the only question now before the Court, *Burroughs* v. *Burroughs* (2) is an authority in our favour, because the evidence was received, although the Judge Ordinary afterwards refused to act upon it.

THE JUDGE ORDINARY. I should like to be able to decide the question on some reasonable ground, but it quite passes my comprehension that it should be proper to admit the evidence of the husband and wife on the question of adultery in a suit for restitution, and improper to admit it in a suit for dissolution or judicial separation. The reasons for and against allowing the parties to be examined on such a question are well known, but it is impossible to suggest a reason why the admission or exclusion of their evidence should depend upon the form of the suit. The only issue in the case is whether the respondent committed adultery. It is not disputed that if Mr. Blackborne had gone on with his suit in the ordinary way, and produced a certificate to prove the marriage, according to the invariable practice of the Court, Mrs. Blackborne would have been a competent witness, and might have given evidence on the issue of adultery. She would then have been within the terms of the statute, which makes the evidence of parties admissible. It is said that a different state of things has arisen because the petitioner does not intend to proceed with his petition for restitution. But the suit is still the same; his application to withdraw the petition was refused, and the petition, the answer,

(1) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, ss. 2 and 4.

(2) 31 L. J. (P. M. & A.) 124.

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and the replication are still on the files of the Court. In deciding a question of this kind, I cannot be guided by the reason or sense of the matter, because there is no sense or reason in it. I have nothing to look to but the language of the act. Now the act makes all parties competent witnesses, except those who are expressly excluded. Those who are excluded are a particular class, namely, the parties to suits instituted on account of adultery. This is a suit for restitution, and not a suit or proceeding instituted on account of adultery. I therefore hold that the evidence is admissible. I agree with the argument that *Burroughs* v. *Burroughs* (1) is an authority for admitting the evidence.

The respondent was accordingly examined as to admissions of adultery made by the petitioner to her.

The jury found that the petitioner had been guilty of adultery.

June 2. *Hawkins, Q.C.* (*Day* with him), moved for a rule nisi for a new trial on the ground of the improper reception of the evidence of the respondent. No doubt if the suit had been for restitution, and the adultery of the petitioner had been pleaded in bar without a prayer for judicial separation, the respondent's evidence would have been admissible; but as soon as the husband abandoned his prayer for restitution, the suit became one for judicial separation on the ground of adultery.

[THE JUDGE ORDINARY. The allegation of adultery was placed on the record as an answer to the petitioner's claim for restitution. If it is a "proceeding instituted in consequence of adultery," when did the respondent begin to institute it?]

When she placed her answer on the record and prayed for a judicial separation. It then became in substance a suit for judicial separation instituted by her.

THE JUDGE ORDINARY. If I could find any guiding principle in the law as it at present stands, I should be inclined to disregard the form of the suit, as Mr. Hawkins suggests, and look only at its substance. If the law declared that where the adultery of a husband or wife is in question, they must not be put in the witness box, I should act on that principle and hold that, although the suit in

(1) 31 L. J. (P. M. & A.) 126.

this particular form is not instituted in consequence of adultery, still, as adultery is the question in the suit, the husband or wife cannot be allowed to go into the witness box. But there is no such principle in the law, because the evidence of the husband or wife is admitted or excluded when adultery is in question, according to the form of the suit. All I can do, therefore, is to look to the language of the statute. I suppose that the intention of the legislature was to prevent parties being examined as witnesses as to their own adultery. There seems to be no objection to a husband giving evidence as to a wife's adultery, or a wife giving evidence as to a husband's adultery; but many objections have been suggested against allowing parties to give evidence as to their own adultery. But if that was the intention, the law does not give effect to it. In one case a husband found his wife in bed with another man, and there was no other evidence of her adultery. As the suit was not defended, I availed myself of the power given by statute to the Court to call and examine the petitioner, and took his evidence (1); but if it had been contested, I should not have done so. That is only one instance of the monstrous absurdity of the law as it at present stands. The question is one that ought to be decided by the full Court.

Dr. Spinks, Q.C., and *Searle*, for the respondent, moved for a decree of judicial separation on the verdict of the jury.

THE JUDGE ORDINARY. I shall refuse a rule nisi for a new trial, and I grant a decree of judicial separation. The whole matter can then be brought on appeal before the full Court.

An appeal to the full Court was presented by the petitioner, but before it came on for argument it was abandoned.

Attorneys for petitioner: *Nash, Field, & Layton.*
Attorneys for respondent: *Risley & Stokes.*

(1) *Tatham* v. *Tatham & Nutt*, 3 Sw. & Tr. 511.

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Dec. 15.

CROTHERS *v.* CROTHERS.

Suit of Restitution—Respondent willing to take his Wife home—Directions as to the Mode of Trial—Practice.

The wife having filed a petition for restitution of conjugal rights, the husband, in his answer, stated his willingness to take his wife home. The Court refused to give directions as to the mode of trial, but ordered the matter to be adjourned into chambers, and that the respondent should file an affidavit in support of the averments in his answer.

In this case Anna Crothers, of Bally Willy, in the county of Armagh, Ireland, petitioned the Court to order her husband, James Crothers, of Brighouse, near Halifax, Yorkshire, to take her home, and to render to her conjugal rights. The petition alleged a marriage to have taken place between the parties on the 1st of May, 1860, and that the said James Crothers has ever since the 15th of April, 1861, refused, and still does refuse, both to permit the petitioner to cohabit with him and to render to her conjugal rights. In his answer the respondent denied that he had so refused; that, on the contrary, he is still willing to cohabit with the petitioner, and render to her conjugal rights. On the 17th of November an application was made on the part of the petitioner for alimony, which however was rejected by the Court.

Inderwick moved for directions as to the mode of trial. He admitted that there did not seem to be any question for trial.

Searle, for the respondent, opposed the motion. The only object of this petition was to obtain alimony from the respondent, and that has failed.

The Judge Ordinary said he should order the motion to be adjourned into chambers for the following motion day; both parties might file affidavits, and he would then judge whether it were necessary to give any directions about the trial. The respondent must satisfy him that he was and is willing to receive back his wife, and, upon the question of costs, that no demand had been made upon him to do so. (1)

Attorneys for petitioner: *Bower & Cotton.*
Attorneys for respondent: *Williamson, Hill, & Co.*

(1) See Additional Rule 175.

LEMPRIERE *v.* LEMPRIERE AND ROEBEL. 1868
July 14.

Suit for Dissolution—Adultery of Wife—Cruelty and Misconduct of Husband.

In a suit by a husband for dissolution of marriage, it was established that the wife was guilty of adultery, and the husband of cruelty and misconduct, conducing to her adultery. The Court refused to amend the husband's petition by allowing a prayer for judicial separation to be substituted for the prayer for dissolution, and the petition was dismissed.

It is doubtful whether, since the passing of the Divorce Act, a husband who has been guilty of cruelty and desertion can obtain a judicial separation on the ground of his wife's adultery.

THIS was a husband's petition for dissolution of marriage on the ground of adultery. The respondent in her answer traversed the charge, and alleged that the petitioner had condoned and had connived at her adultery, if any, and further charged him with cruelty. The cause came on for hearing on the 19th of June before the Judge Ordinary without a jury.

Evidence was given of the marriage in March, 1857, and the subsequent cohabitation, and it was proved that the respondent had for some years past been living with the co-respondent as his wife. The petitioner had been a draper's assistant, and a coal and commission agent, and had followed other occupations. In the course of the hearing the Judge Ordinary, with the consent of counsel on both sides, allowed a cross petition to be filed at once by the wife for a judicial separation on the ground of cruelty, and an answer to be filed by the husband. At the close of the evidence in the husband's suit the wife was examined in her own suit in support of the charge of cruelty, and the husband was examined in contradiction of her evidence.

Dr. Tristram, for the husband.
Kenealy, Q.C., and *Pater,* for the wife.

THE JUDGE ORDINARY came to the conclusion that the adultery of the wife and the cruelty of the husband were established, and refused a decree nisi for a dissolution of marriage.

Dr. Tristram asked for a decree of judicial separation on the

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ground of the wife's adultery. The cruelty of the husband is no answer to the adultery of the wife in a suit for judicial separation.

Cur. adv. vult.

July 14. THE JUDGE ORDINARY. On the trial of this cause it was intimated by the Court that the adultery of the respondent was established. It was also established on the evidence in this suit, independently of the cross petition which the Court permitted the respondent to file, that the petitioner had for years treated his wife with great barbarity. He was an habitual drunkard, and had savagely beaten his wife on numerous occasions. She had continually sought the protection of the law, and he had been many times before the magistrates. Finally, he was sentenced to six months imprisonment for an assault upon her; and on regaining his liberty he went to Birmingham instead of seeking his wife, and lived a considerable time apart from her. After a time, and as I believe after her adulterous intercourse with the co-respondent had commenced, she went to Birmingham for a fortnight, during which she cohabited with her husband. But her object in thus returning to him was to see her children, and I do not believe she intended to condone the past.

On this state of facts it is plain that the petition for dissolution of the marriage must fail, for the husband has been guilty not only of cruelty, but of misconduct which conduced—and, in my judgment, very largely conduced—to his wife's adultery; indeed, it is scarcely too much to say that his treatment of his wife drove her into cohabitation with another man.

But it is contended that, although the petition thus fails under the provisions of the Divorce Act, the Court ought to allow him to amend his petition, and to convert it into a petition for judicial separation; and then it is said that his cruelty and misconduct will be no answer to his wife's adultery, and he will be entitled to a decree.

It seems to me that it would be a great injustice if he could thus obtain a decree against his wife in respect of the adultery which he so largely aided to bring about, and I shall therefore give him no aid in doing so. A similar application was made in

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Boreham v. *Boreham* (1), and refused by this Court. Whenever the question here mooted arises in a suit properly instituted for judicial separation, it is desirable that it should be gravely considered, whether, since the Divorce Act, a husband himself guilty of cruelty or desertion can sue for a judicial separation on the ground of his wife's adultery; still more whether he can do so in case his own cruelty or desertion has, in the judgment of the Court, led to the adultery of which he complains.

I am aware that in the Ecclesiastical Court there is more than one decision, that, by way of compensatio criminis, cruelty is no answer to adultery. At the same time there are passages to be found in one judgment, at least, which tend to make it doubtful whether such a rule would be applied where the cruelty preceded and brought about the adultery. "There may by possibility be cases where cruelty may lead up directly to the wife's adultery. I say nothing upon such a case." This is the language of Dr. Lushington in *Dillon* v. *Dillon*. (2) But the divorce acts made a great change in the law of the ecclesiastical courts, by constituting desertion a matrimonial offence, and by giving the larger remedy of dissolution of the marriage for the wife's adultery. It will be proper to consider how far these changes and the general restrictions under which relief is given by those acts in cases of divorce do or do not multiply the restrictions within which judicial separation should be granted, beyond those which were recognized in the ecclesiastical courts in suits for divorce à mensâ et thoro. And the more so because this doctrine of compensatio criminis is not a wholly satisfactory one, or capable of being logically adopted as a guide in giving or refusing relief. It is said that the cruelty of the husband will not justify the adultery of the wife; but so neither will his own adultery, and yet this latter has ever been held a bar. Again, what is par delictum? What standard has the Court for the measure of matrimonial offences, except the punishment with which they are visited, or the relief to which they give a title? In a suit for divorce à mensâ et thoro, adultery and cruelty stood upon a level in these respects; and in a suit for judicial separation they do so now. There is much to consider under these and some other heads, whenever the question arises.

(1) Law Rep. 1 P. & D. 77.

(2) 3 Curt. at p. 94.

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In the present case both petitions must be dismissed; the wife to have her costs of establishing the cruelty.

Attorneys for petitioner: *Chilton, Burton, & Co.*
Attorney for respondent: *A. Warrand.*

Dec. 15.

BARNES *v.* BARNES AND BEAUMONT.

*Suit for Dissolution—Verdict of Jury—Adultery of Petitioner and Respondent proved—New Trial offered to Petitioner and refused—Decree nisi—*20 & 21 *Vict. c.* 85, *s.* 31—*Discretion.*

In a suit for dissolution of marriage which was tried before the Judge Ordinary and a special jury, the jury found that the respondent had committed adultery with the co-respondent, and that the petitioner had committed adultery also, but they declined to answer with whom or in what place, or whether or not it was with the knowledge and consent of the respondent. The co-respondent having obtained an order for a new trial, the Court signified that the petitioner might also have a new trial on the question of his adultery, but he refused it. The Court declined to exercise its discretion under the 20 & 21 Vict. c. 85, s. 31, on the ground that the evidence of the petitioner's adultery was insufficient, and the verdict thereon unsatisfactory, and to make a decree nisi notwithstanding the verdict.

WILLIAM CHARLES BARNES petitioned the Court to dissolve his marriage with the respondent, Emily Sarah Barnes, by reason of her adultery with John Beaumont, and he prayed damages. The respondent and co-respondent denied the charge, and the respondent further charged the petitioner with adultery, to which he pleaded a traverse and connivance. The questions at issue were tried before the Judge Ordinary and a special jury on the 22nd of July, 1868, and they found that the respondent and co-respondent had committed adultery together, and they assessed the damages at 1000*l.* They further found that the petitioner had committed adultery, but they could not say with whom or in what place, and they declined to answer whether or no such adultery had been committed with the knowledge and consent of the respondent. An application was afterwards made on behalf of the co-respondent for a new trial, on the ground that the verdict as regards him was against the weight of evidence. The point was argued before the Judge Ordinary, Willes, J., and Cleasby, B., on the 19th of

November, 1868, when they directed that the verdict on the second issue, namely, whether the co-respondent had committed adultery with the respondent, should be set aside, and a new trial thereof had, and if the petitioner should apply to the Judge Ordinary to set aside the other issues found at the trial, then that a new trial should be had on all the issues, but in that case the second issue should be tried separately from the other issues; and the Court reserved the question of costs for the consideration of the Judge Ordinary.

Willis, for the petitioner, moved the Court to grant a decree nisi as prayed in the petition. The petitioner is not in a position to avail himself of the permission given to him by the full Court as he has not the means to carry on a second inquiry. The evidence of the petitioner's adultery was so slight, and the verdict of the jury so unsatisfactory, that the Court should exercise its discretion under 20 & 21 Vict. c. 85, s. 31, and make a decree nisi notwithstanding the evidence given of the petitioner's adultery. He referred to *Narracott* v. *Narracott*. (1)

[THE JUDGE ORDINARY. I think there are two courses proposed to me, although they have been somewhat mixed up together. There is an existing finding of a jury as to the petitioner's adultery, and leave to review such finding, which the petitioner declines. He asks me first to pass by the finding and say that the Court is not satisfied with the evidence of adultery, or, adopting the finding of the jury, to exercise my discretion under s. 31 of the Divorce Act.]

Dr. Deane, Q.C., for the respondent. The case of *Narracott* v. *Narracott* (1) does not apply. In that case the jury could not agree, and therefore there was no finding; but here the husband has been found guilty of adultery, and an opportunity having been offered to the petitioner for a new trial, which he refuses, it must be assumed that he is guilty, and there is no case in which, under such circumstances, the Court has exercised its discretion in favour of the petitioner.

Dr. Swabey, on the same side. By s. 28 of the Divorce Act the parties have a right to insist that any contested matters of fact

(1) 3 Sw. & Tr. 408; 33 L. J. (P. M. & A.) 132.

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shall be tried by a jury, and the petitioner has availed himself of that right. The discretion, therefore, given by s. 31 does not depend on the credibility of the evidence whether adultery has been committed or not, for the jury have decided that point; but, assuming the fact of adultery, does the Court think that the petitioner is entitled to a decree nisi?

[THE JUDGE ORDINARY. Although in a suit before the Court it may adopt the verdict of a jury, by s. 31 the Court itself must be satisfied on the evidence of certain matters before it makes a decree.]

If the Court is not satisfied with the verdict of a jury, the proper course is to order a new trial.

SIR J. P. WILDE. I must assume that the liberty given to the petitioner by the full Court is one that he cannot or will not avail himself of, and therefore, as against him, the verdict of the jury stands. Now, it is said, that there is not sufficient proof of adultery against the petitioner, although it is clear there was some evidence which did point to that fact, and the jury found him guilty accordingly. One of two courses then is presented to me: either I may pass over the verdict altogether, or assuming, in accordance with the verdict, the fact of adultery to be proved, I may exercise my discretion under s. 31. I am of opinion I cannot follow either one or the other. The verdict must have its ordinary effect. I cannot say I am not satisfied with the guilt of the petitioner, the jury having found it, and the petitioner not having accepted the opportunity he had of a second inquiry. I come then to the question whether, assuming the adultery to have been committed, I shall exercise my discretion. The Court is *not bound* to grant a divorce. It is suggested that the cases in which the Court will not make a decree are the exceptions to the rule. In putting a construction upon the words of the statute the Court will consider what was the practice of the House of Lords before the passing of the Divorce Act, and of Sir C. Cresswell and others who acted with him. I am satisfied that under such circumstances to withhold a decree was the rule, to grant it the exception. I do not feel inclined to depart from that practice. It will be only in rare cases the Court will overlook the adultery of a petitioner, and I reject the motion.

The Court afterwards determined that the respondent was entitled to her full costs against the petitioner, but refused to dismiss her from the suit until the proceedings between the petitioner and the co-respondent had been concluded.

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Attorney for petitioner: *J. F. Chorley.*
Attorney for respondents: *J. Lott.*

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IN THE GOODS OF MAY.
IN THE GOODS OF WILSON.

July 28.

Wills Act—Revival of revoked Will by Codicil—Mistaken Reference by Date in Codicil—Proof of Intention to revive.

2 P.D. 112.
6 P.D. 185

A codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, but the codicil must "show an intention to revive the same" (1 Vict. c. 26, s. 22). In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court with reasonable certainty the existence of the intention. Since the passing of the statute a will cannot be revived by mere implication.

References in codicils to revoked wills by their dates held insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to.

IN these three cases, the facts of which are stated in the judgment, the same question arose.

Dr. Deane, Q.C., and *A. Staveley Hill, Q.C.*, appeared *In the Goods of Steele*, which was moved on the 7th of July.

Dr. Tristram appeared *In the Goods of May*, which was moved on the 14th of July.

Pritchard appeared *In the Goods of Wilson*, which was moved on the 21st of July.

July 28. SIR J. P. WILDE. The broad question in these three cases is, whether a will which has been revoked, and another will substituted, has or has not been revived by the operation of a subsequent codicil. This is a question of construction, and one of some difficulty.

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The occurrence of no less than three instances within a short period in which this question has arisen, makes it desirable to pass in review some of the decisions by which the judgment of the Court ought to be guided. The following appear to be the propositions established by previous authority:—Unless there be a latent ambiguity in the codicil, evidence of the testator's real meaning must be excluded. This is in obedience to the well-known common law doctrine with respect to written instruments, as was decided in *Walpole* v. *Cholmondeley* (1), which was acted upon *In the Goods of Chapman.* (2) It may be proper on some future occasion to consider the doctrine upheld in courts of equity, where mistakes, if proved to demonstration to be so, have been rectified even in written documents. This subject is well discussed in Story's Equity Jurisprudence, 156, 157.

The next proposition is this: that, although evidence of the testator's intention is excluded, the Court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used. This is a doctrine constantly acted upon at common law in relation to written documents, and notably in cases of written guarantee. It is affirmed in the fifth proposition of Sir James Wigram's excellent book on this subject.

Thirdly, it has been decided by no less than three very remarkable cases, that if the codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator animo revocandi, the codicil cannot effect its revival.

The circumstances of these three cases of course varied, but in all three there were two wills, the later one revoking the former, and a subsequent codicil referring by date to the former will. They all had this further feature, that the first will was not only revoked, but destroyed. The earliest was the case of *Hale* v. *Tokelove* (3), decided by Dr. Lushington in 1850. He held that the codicil would not in law revive the fresh will, because the will "was gone, destroyed, animo revocandi," but that the second will "was revoked by necessary implication because a prior will was confirmed." The

(1) 7 T. R. 138. (2) 1 Robt. 1.
(3) 2 Robt. 318.

only paper entitled to probate he held to be the codicil. The next was the case of *Newton* v. *Newton* (1), determined in Ireland by Mr. Justice Keatinge in 1860. He held, like Dr. Lushington, that the codicil could not revive the first will, but that the second will was entitled to probate as the intention to revoke the second was dependent upon the establishment of the first. His decision on this last head was reversed by the Court of Appeal in 1861 (2), and the testator declared to have died intestate. The last case was that of *Rogers* v. *Goodenough* (3), decided by Sir Cresswell Cresswell in 1862. He held, as in the other cases, that the codicil could not revive a will that had no existence, but that, there being no words in the codicil expressing the intention to revoke the second will, and no dispositions of property inconsistent with that will, there was no ground for affirming that in any of the modes pointed out by the statute a revocation of the second will had been effected; and he granted probate of the second will and the codicil as together containing the will of the deceased. This last case, it will be observed, is an authority for this further proposition, that a codicil which refers by date, and which the testator intended as a codicil to one will, may be entitled to probate with another will.

Assuming, then, upon these authorities, that a codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, and that in ascertaining whether the testator intended such revival, the Court is precluded, unless there is a latent ambiguity in the codicil, from receiving any evidence except what may suffice to place it in the position of the testator, the next question will be, what is the effect of the statute?

The words of the section (4) are as follows:—"No will which shall be in any manner revoked shall be revived" by a codicil, unless it be a codicil duly executed, and "shewing an intention to revive the same." What is the meaning of these last words? To appreciate them, it is necessary to bear in mind the law as it stood when they were enacted. The theory of the law is, and always was, that a codicil forms part of a will, and consequently that to make a codicil to your will is first to affirm the existence of that will; and,

(1) 5 L. T. (N.S.) 218.
(2) 12 Ir. Ch. Rep. p. 118.
(3) 2 Sw. & Tr. 342; 31 L. J. (P. M. & A.) 49.
(4) 1 Vict. c. 26, s. 22.

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IN THE GOODS OF STEELE. before the act, an inference which the law drew from the making of a codicil, that the testator intended to re-affirm his will, and, if the will had been revoked, by re-affirming it to revive it. In brief, it would not be wrong to say that all codicils to wills were held before the act passed to revive the wills to which they were respectively codicils, if such wills had been previously revoked. As soon, therefore, as it could be ascertained that the codicil in question was a codicil to a particular revoked will, that will was revived. The difficulty with which the courts in the contested cases had to grapple, was to ascertain to which or what will the disputed paper was intended as a codicil.

Such being the state of the law before the act, I hesitate to accept the conclusion, that the express words of the section meant to leave the matter in the same state in which it would have stood if they had never been introduced. If the merely declaring that a particular paper was to be taken as a codicil to a particular will was all that the legislature required, when it enacted that the codicil should "shew an intention to revive" a revoked will, the words "shewing an intention to revive the same" were quite needless, for every codicil to a revoked will, by force of being a codicil to such will, so shewed it. I therefore infer that the legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. In other words, I conceive that it was designed by the statute to do away with the revival of wills by mere implication. It is proper here to take note of the case of *Payne* v. *Trappes*. (1) In that case there would seem to have been but little beyond the reference by date to shew the intention to revive a former will. But the Court did not lay down the proposition that the date alone was sufficient; on the contrary, the learned judge said he must "gather the intention from the codicil itself;" "that the intention to revive the former

(1) 1 Robt. 583.

will was clearly shewn;" and "that the testator had taken great pains to describe the instrument to which the paper was intended as a codicil." The decision proceeded upon the ground that the judge was convinced of the testator's intention, not that he felt bound by the language in the face of an opposite conviction. On the other hand, I am much fortified in the view I take of the meaning of the statute by the remarks of Sir C. Cresswell in the case of *Marsh* v. *Marsh*. (1) I allude to his statement that the words "last will" and "primâ facie" refer to the real last will, and particularly to the opinion he there expressed, that "it appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals."

The due result of the documents in each case, and of such external facts as may be admitted in evidence, must of course be gathered from the language of the documents themselves read in the light of such facts. Some general views however present themselves—some general probabilities of intention attend all such cases as those now under judgment. It may in the outset, I think, be doubted whether any testator who bore in mind that he had revoked his will, and substituted another for it, ever really sat down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by simply making a codicil referring by date to his first will without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading idea of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for that object. On the other hand, I conceive that, in the vast majority of cases, when a man declares his intention that a particular paper, varying his previous dispositions, shall be taken as a codicil to "his last will and testament," he means that which really is his last will and testament, his then *existing* will, and the dispositions of his property then in force. In like manner, when he goes on to declare, in the common language of codicils, that "in all other respects he ratifies and confirms his last will and testament," he really means to confirm that which exists, and not to bring to life a paper which has ceased to be testamentary

(1) 1 Sw. & Tr. at p. 533; 30 L. J. (P. M. & A.) 77.

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or revive dispositions which have no existence, and are therefore not, properly speaking, capable of being ratified.

That these conclusions are just in the main is amply proved by the fact that, whenever full light has been cast on the testator's real purpose by means of parol evidence, the reference to the earlier will has in most cases turned out to be nothing but a blunder. If experience had not shewn the fact, it would be almost incredible that mistakes should occur so constantly as they do in so simple a matter as reciting the true date of a will. And yet in many cases errors of this kind, if allowed to be proved, can not only be proved, but proved to demonstration. The excluded evidence in the celebrated case of *Walpole* v. *Cholmondeley* (1) proved the error that had been committed and the cause of it, on testimony so clear and so free from suspicion as to remove the last trace of reasonable doubt. Sometimes the error arises from the attorney or a clerk who has laid his hand on the wrong paper; sometimes from the testator who has kept his first will in his own possession and forgotten his second, which he has left in the hand of his attorney; oftentimes from the employment of an attorney to draw the codicil, who has made an earlier will, and has been in ignorance that an intermediate will has been made. I am, therefore, of opinion that the Court ought to be slow to conclude that a testator has manifested in this indirect way a desire to revoke his last will, and that it should scrutinize narrowly the language of a codicil which is said to shew such an intention, lest in the desire to follow the testator's wishes too blindly it should set them at nought altogether.

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I proceed to the facts of the present case. The testator made a will on the 16th of January, 1866. On the 25th of October, 1866, he made a fresh will, revoking the former. On the 12th of January, 1868, he made a codicil which was declared to be a codicil "to his last will and testament, which will bears date the 16th day of January last past;" in other words, the 16th of January, 1867. At the conclusion of the codicil he confirms his said last will.

(1) 7 T. R. 138.

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Here is a latent ambiguity, and the Court may resort, if need be, to the affidavits filed. But I am of opinion that on the face of the documents themselves there is no intention shewn with anything like sufficient distinctness to revoke the testator's last will, and revive the former one.

It is true that the codicil speaks of the last will as containing a legacy to his nephew of a hundred pounds, and that this legacy is to be found in the will of 1866, whereas in the last will the legacy is reduced to fifty pounds.

But that the memory of the testator, an old man past eighty, was at fault, is clear by his widely incorrect reference to the date of his last will, and I see no reason why it should not have failed him in describing the amount of the legacy which he wished to revoke, though he bore in mind the object of his bounty.

On the other hand, the will he speaks of is his "last will;" and then no trace of a desire to depart from it is to be found on the face of the codicil. I think, therefore, that the will of October, 1866, was never revoked, and that it is entitled to probate, together with the codicil in question.

IN THE GOODS OF MAY.

IN THE GOODS OF MAY.

The facts of this case are as follows:—The testator made a will on the 11th of January, 1860. On the 18th of August, 1860, he married. On the same 18th of August, after his marriage, he made a fresh will, and in terms revoked his former one. In the month of September in the same year he took the trouble to cancel his first will by tearing off the signature. On the 3rd of July, 1861, he made a codicil which he described as "a codicil to the last will and testament of me, John May, of, &c., and which will bears date the 11th day of January, 1860."

If parol evidence is admissible, it is plain that this reference to the earlier will was nothing but a mistake on the part of the attorney who drew it; but I do not think it is necessary to decide whether it was so or not. For I am unable to perceive any sufficient evidence on the face of the codicil itself that the testator entertained an intention to revive the former will. His marriage itself

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had revoked it. He had immediately after his marriage substituted another for it in almost the same identical terms, and to prevent all mistake he had taken the trouble to tear off the signature. It is plain that in September, 1860, when he thus acted, he considered the will of August to be the effective record of his testamentary dispositions, and I can conceive no motive which would render it probable or hardly possible that he should desire to revive the will of January.

In a word, the codicil read by the surrounding circumstances of the case fails to shew the necessary intention. The Court grants probate of the will of August, together with the codicil of July, 1861, and a further codicil of the 6th of September, 1865, as to which no question was made.

IN THE GOODS OF WILSON.

IN THE GOODS OF WILSON.

In this case the testator made his will on the 24th of September, 1858. On the 16th of July, 1861, he made a fresh will, disposing of the whole of his property. The first will was found after his death with the signature torn off, and had been used by him as a draft for the second will. On the 20th of December, 1864, he made a codicil, which he declares to be a codicil to "his last will and testament, dated the 24th of September, 1858." Notwithstanding this perfectly distinct reference to the date of his earlier will, it is plain to demonstration, from the contents of the codicil itself, that he was really referring to the will of 1861.

He speaks of bequests which are to be found only there, and goes on to say that he has altered those bequests in his own hand on the face of "his said will," and for greater certainty has numbered the lines in which these alterations are to be found. These alterations with numbers to the lines are found in the will of 1861, and the Court has no hesitation in affirming that it was to that will he intended the codicil to apply. The Court grants probate of the will of 1861 with the codicil of 1864.

Attorneys in Steele's case: *Bischoff, Coxe, & Bompas.*
Proctor in May's case: *A. N. Cherrill.*
Attorney in Wilson's case: *Spofforth.*

DUPREZ *v.* VERET.

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Dec. 1.

Testamentary Suit—Pleas—No Plea as to Domicil—Lis Alibi pendens—Suspension of Proceedings—Leave to Amend.

The plaintiff having propounded the will of the deceased, the defendant pleaded the usual pleas, but none as to the domicil of the deceased. Issue having been joined, the cause was ordered and the day fixed for trial by a special jury. The Court refused to order the proceedings in this Court to be suspended, on an affidavit by the defendant that the deceased's domicil was in France, and that proceedings had been instituted in the proper court of that country to try the validity of the will in dispute. Further, it refused to allow the pleadings to be amended, in order to raise the question of jurisdiction on the amended pleadings.

THE plaintiff, Alexandrine Caroline Zelia Duprez, as sole executrix, on the 1st of April, 1868, filed a declaration propounding the will of Louis Nicholas Stanislas Veret, otherwise Louis Bonté, late of 46, Gainsford Street, Horselydown, Surrey, such will bearing date February 6th, 1868. The deceased died on or about the 27th of February, 1868. The defendant, Vincent Paul Veret, one of the brothers and next of kin of the deceased, on the 5th of May, 1868, filed his pleas, which set out (1) that the will was not executed in accordance with the requirements of 1 Vict. c. 26; (2), that on the day the will bears date, the deceased was not of sound mind, memory, and understanding; (3), that the will was obtained by the undue influence of Marie Josephine Armande Caroline Duprez (the universal legatee named in it), and others acting in concert with her; and on the 14th of May, 1868, the defendant filed particulars as to this last clause, that he meant thereby the Rev. Joseph Thomas Berwick, of Westmill, Buntingford, Herts, clerk. Issue was joined on the 22nd of May, 1868, and on the 8th of June the questions of fact were ordered to be tried by a special jury. The day fixed for the trial was the 11th of December. In the meantime a bill had been filed in the Court of Chancery, in the names of the defendant and others, to restrain the plaintiff and her sister, the universal legatee, from intermeddling with the estate of the testator, and for a receiver. In this bill it was alleged that the testator was a domiciled Englishman. On the 26th of August, 1868, a citation was extracted from the Tribunal Civil at Montdidier, in the department of the Somme, France, by the defendant,

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Vincent Paul Veret and others, calling upon M. J. A. C. Duprez, calling herself the universal legatee of Louis Nicholas Stanislas Veret, domiciled last at Roye, and still domiciled there unless proved to the contrary, actually inhabiting Gainsford Street, to appear before the Procureur Imperial at Montdidier on the 26th of October, 1868. The grounds on which this citation was allowed to issue were stated in it as follows:—That L. N. S. Veret, in his lifetime, merchant, born in France, and continuing a French subject, domiciled at Roye, died on the 27th of February 1868, and that in consequence of the opposition of the defendants the Probate Court ought to be put off the verification until the validity of the alleged wills has been estimated by competent judges. That the only tribunal competent to appreciate the merits and the validity of the wills is that of Montdidier, in the arrondissement in which the said L. N. S. Veret was domiciled, and in which his succession is open. That the French tribunal is exclusively competent since all parties to the suit are French subjects. That the Verets maintain that the wills in question are void in form, in that notably the witnesses have not signed in the presence of one another and of the testator; that these wills quite on another ground are void on the ground of suggestion and captation; lastly, that the universal legatee employed manœuvres of a kind to deceive the testator, and that he had no will of his own. It appeared from the affidavit of the defendant, and of Daniel Poignard, docteur en droit, that the deceased, until the year 1850, resided and carried on the business of a corn merchant at Roye, in France; that in that year a criminal charge was made against him, and he left France to avoid a trial. That in default of appearance he was, on the 17th of July, 1850, sentenced to ten years' imprisonment. That according to the law of France, a person who is sentenced by its tribunals to ten years' imprisonment in default of appearance, may return to France after twenty years have elapsed from the date of such sentence, and the same is thereby purged and satisfied. That during the whole time the deceased resided in England he had a fixed intention to return to France at the expiration of the twenty years. That, therefore, he was always a domiciled Frenchman, and never gave up, and never intended to give up, his domicil in France. They also stated that the cause will be

heard before the Civil Tribunal of Montdidier on or about the 15th of December instant.

Dr. Tristram, for the defendant, moved that the proceedings in this court should be stayed until the dispute as to the validity of the will had been determined by the proper court in the country of domicil.

[SIR J. P. WILDE. The question raised in this suit is whether the will is executed in accordance with the English law. If the domicil of the deceased were French, possibly the will is invalid judging it by the French law, but the issues joined do not raise the question of domicil. If I were to suspend the proceedings, it might turn out that the French court would not decide any of the points before me.]

The same issues will be decided in France as here.

[SIR J. P. WILDE. Assuming that to be so. Besides the question whether this will has been executed in accordance with the technical form required in this country, the only substantial point which remains for consideration regards the capacity of the deceased. Why should I suspend the determination of these questions here?]

Dr. Spinks, Q.C., and *Pritchard*, for the plaintiff. The defendant has all along treated this as an English case: in the Court of Chancery he even alleged that the deceased was domiciled in England; he cannot now claim to have the cause delayed on the ground that the deceased's domicil is French. They referred to *Hawarden* v. *Dunlop*. (1)

Dr. Tristram asked leave to amend the pleas by pleading the French domicil.

SIR J. P. WILDE. In this case the testator died in February, 1868, thereupon his executrix propounded his last will, treating it as an English will, and alleging it was made in accordance with the English law. It was open to the defendant to have adopted one of two courses. He might have alleged that although the deceased resided in England some years, having come here under peculiar circumstances, he always intended to return to France;

(1) 2 Sw. & Tr. 150; 31 L. J. (P. M. & A.) 17, 180.

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that he never acquired any domicil in England, nor lost his original domicil. He might then have gone on to say that the paper propounded was not a will according to the law of domicil. The other course was to treat this as the will of a domiciled Englishman, and to traverse the declaration. The defendant took this latter course, and with his eyes open, because all the facts now relied upon were then known to him, as fully appears from his affidavit. It being then well known to him all along that the deceased's domicil was French, nevertheless he takes issue upon the question whether the will is valid according to the law of England. The suit goes on, issue is joined, and directions are given as to the mode of trial. It is not until after all this that in August this year the defendant applies to the French court, takes out a citation against the plaintiff, and then comes here and asks that these proceedings should be stayed. But the questions to be determined in the French court may be entirely different from those to be decided in the English court. In France the first question to be decided will be, whether the deceased was or was not a domiciled Frenchman; here, the English domicil being admitted on the pleadings, the question to be determined is, whether the will was executed in accordance with the English law. Consequently, the decision of the English court may be given on totally different grounds from those on which the French court decides; one will be quite independent of the other. It would be monstrous to stay proceedings in one suit in order to allow a decision to be given in another, on perhaps a totally different question. As regards the defendant's second application to be allowed to plead that the deceased was not domiciled in England, that is a matter entirely within the discretion of the Court, and it will not allow new matter to be introduced at this stage of the suit, unless it can be shewn that the defendant was mistaken as to the facts; but the facts were well known to him all along, and it would not be fair to allow him now to bring in a fresh set of pleas founded on those facts only which were within his knowledge in the first instance. I reject the motion.

Dr. Tristram, under Rules and Order, 1862, par. 87, applied for leave to appeal from this decision

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SIR J. P. WILDE gave leave to appeal as the question was an important one, but only as regards his refusal to stay the proceedings; the other point, for leave to amend, was a mere matter of discretion, and not the proper subject of an appeal. He declined to order the suspension of the proceedings pending the appeal.

Attorneys for plaintiff: *Weir & Robins.*
Attorney for defendant: *E. Manière.*

SMITHE *v.* SMITHE AND ROUPELL.

Dec. 1.

Dissolution of Marriage—Settlements—Guardian of Minor Children—Children provided for under their Father's Will—Wife's Power of Appointment by Will.

The petitioner, the husband, died after a decree absolute had been made to dissolve his marriage with the respondent. He executed a will by which he excluded some of his children from participation in certain property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate. The Court, whilst it extinguished the respondent's life interest in her husband's property, refused to compel her, out of her separate income and estate, which was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children.

An executor of a deceased petitioner cannot, as such, petition for an alteration of the settlements. The guardian of the minor children is the proper person to do so.

THIS was originally a suit to dissolve the marriage of William Forster Smithe, of Staplefield House, Sussex, with Lilla Rosalie Smithe, by reason of her adultery with John Stuart Roupell. A decree nisi, which was pronounced on the 21st of June, 1867, was made absolute on the 14th of January, 1868. On the 16th of January, 1868, Mr. Smithe died, having made a will, in which he appointed the Rev. Augustus Kerr Bozzi Granville sole executor and trustee, and Mr. Granville and Frederick Smithe guardians of his children. By this will, after reciting the powers given to him in his marriage settlement, he directed that his son, Edmund Ducane Smithe, and his two daughters, Amy Tredcroft Smithe and Lilla Livingstone Smithe, should be entirely excluded from any participation in the property and moneys mentioned and contained in such settlement, but he left to each of them an annuity for

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their respective lives of 100*l.*, to be paid out of his general estate. He further directed that all his children should be educated, clothed, maintained, and provided out of his personal estate or the income of the settlement funds, according to the judgment and discretion of the guardians, so far as the same could be so applied. The whole of the moneys comprised in his marriage settlement he ordered to be divided into two equal parts for his sons, Arthur D'Orville Smithe and Bovil Granville Smithe, on attaining the age of twenty-one years respectively. All other moneys, howsoever invested, he ordered to be equally divided between the two last-named sons and his son Percy Bourdillon Smithe, and the residue to be left to his son Arthur D'Orville Smithe, with a reversion therein to the other sons, Percy Bourdillon Smithe and Bovil Granville Smithe, in case one or other should die under age. Two indentures of settlement were executed on the occasion of the marriage of Mr. and Mrs. Smithe on the 25th of January, 1848. By the one Mr. Smithe settled property which now produces an income of about 210*l.* per annum, and directed that such income should, after his death, be paid to his wife for her life, and that on the death of the survivor of him and his wife the property should be held in trust for the child or children, if more than one, and for all and every or such one or more exclusively of the others or other of the children of him, William Forster Smithe, by the said Lilla Rosalie Smithe, with such provision for his, or her, or their maintenance, education, and advancement at such age or time, or respective ages or times, and if more than one, in such shares, and with such restrictions and limitations over for the benefit of the said children, or some or one of them, and in such manner in all respects as he, the said William Forster Smithe, should by any deed or deeds, instrument or instruments in writing, revocable or irrevocable, sealed and delivered in the presence of and attested by one or more credible witness or witnesses, or by will appoint, and in default of such appointment, and subject thereto, in trust for all and every the children and child of the said William Forster Smithe by the said Lilla Rosalie Smithe, in equal shares.

By the other, Anthony Sheppey Greene, the father of Mrs. Smithe, covenanted to secure to the trustees an annuity of 60*l.* and a sum of 2000*l.* Three per Cent. Consolidated Bank Annuities,

the annuity to be paid half-yearly until the said sum of 2000*l.* Three per Cent. Consolidated Annuities had been paid or transferred to the trustees: upon trust that they should, during the life of the said Lilla Rosalie Smithe, pay into her proper hands, or authorize and empower her to receive the said yearly sum of 60*l.*, and the dividends, and interest, and annual produce of the said principal sum of 2000*l.* Three per Cent. Consolidated Bank Annuities, when and as the same respectively should become payable, so that the same should be for her sole and separate use independently and exclusively of the said William Forster Smithe, and of his debts, control, interference, and engagements, and so that her receipts alone should be discharges for the same, but that she should not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation, and immediately after her decease, upon trust to pay the yearly dividends thereof to William Forster Smithe for life, and on the decease of the survivor of them, to stand possessed of the trust funds in trust for the child, or if more than one, for all and every such one or more exclusively of the others or other of the children of the said William Forster Smithe by the said Lilla Rosalie Smithe, with such provisions for his, her, or their maintenance, education, and advancement at such age or time, or respective ages or times, and if more than one, in such shares, and with such restrictions and limitations over for the benefit of the said children, or some or one of them, and in such manner in all respects as the said Lilla Rosalie Smithe should by will appoint, and in default of such appointment, and subject thereto, in trust for all and every the children and child of the said William Forster Smithe by the said Lilla Rosalie Smithe in equal shares. The surviving trustees of these settlements were the Rev. John Read Munn and Albert Francis Jackson.

The said Anthony Sheppey Greene died on the 3rd of September, 1856. By his will, of which the Rev. John Read Munn was an executor and trustee, Mr. Greene left the residue of his estate in trust in the event which has happened: that the trustees should pay the annual income thereof unto such person or persons, and in such manner and form as Lilla Rosalie Smithe, by any writing under her hand, should from time to time (notwithstanding cover-

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ture) direct to receive the same, and in default of such direction, into the proper hands of his said daughter for her sole use, free from marital control: and after the decease of the said Lilla Rosalie Smithe, upon further trust to pay his said residuary estate unto and amongst all and every, or such one or more exclusively of the other or others of the children or child of the said Lilla Rosalie Smithe, or the issue born in her lifetime of such child or children, in such parts, shares, and proportions, and at such ages or times, and in such manner as the said Lilla Rosalie Smithe, by her will or any codicil thereto (notwithstanding coverture), should direct or appoint, and in default of such appointment to pay and assign the residuary estate equally amongst the children and issue of the said Lilla Rosalie Smithe. The income derivable from the residuary estate of Mr. Greene was stated on behalf of the respondent to amount, with the interest on 2000*l.* Three per Cent. Consols, to 230*l.* Besides the six children mentioned in Mr. Smithe's will, two others were born, both before the decree for a dissolution of marriage was made absolute, and one before the decree nisi was made. The respondent and co-respondent have, since the death of Mr. Smithe, intermarried.

The Rev. Augustus Kerr Bozzi Granville, as executor of the will of William Forster Smithe, and one of the testamentary guardians of his children, on the 4th of May, 1868, filed a petition praying the Court, under 22 & 23 Vict. c. 61, s. 5, to vary the trusts of the settlements made on the marriage of the petitioner and respondent. The petition was referred to one of the registrars of the Court of Probate, who filed his report on the 4th of November, 1868, in which he stated that it was proposed by Mr. Granville, and agreed to by the respondent, that, subject to the approbation of the Court, the trustees under the first-mentioned settlement should pay and apply the income arising therefrom as if the said Lilla Rosalie Roupell had died in the lifetime of the said William Forster Smithe: that it was also proposed by Mr. Granville, but not now assented to by the respondent, that one-third part or share of the annual income of the said Lilla Rosalie Roupell, derivable from the property settled by her father, or under the will of Mr. Greene, should, from and after the date of the order of this court, during the lifetime of the said Lilla Rosalie Roupell, be

paid and applied in equal shares for the use of Edmund Ducane Smithe, Amy Tredcroft Smithe, and Lilla Livingstone Smithe, the children of the said William Forster Smithe and Lilla Rosalie Roupell, who have been excluded respectively by the will of the said William Forster Smithe from any participation in the property and moneys referred to and contained in the first settlement. Lastly, it was proposed that the Court should make an order that Mrs. Roupell should appoint one moiety of the capital of the property comprised in the settlement executed by Mr. Greene amongst the said Edmund Ducane Smithe, Amy Tredcroft Smithe, and Lilla Livingstone Smithe, but the registrar submitted that that could not be done, as the said Lilla Rosalie Roupell has no power under the indenture of settlement to appoint the said capital of the said property otherwise than by her last will and testament, and that any exercise of such power by her must be necessarily revocable.

On the case being called,

THE JUDGE ORDINARY noticed that the petition was presented by Mr. Granville as executor of the will of Mr. Smithe; and, on *Dr. Deane* stating that Mr. Granville was also one of the testamentary guardians of Mr. Smithe's children, the Judge Ordinary directed that the petition should be amended in that particular.

Dr. Deane, Q.C., for Mr. Granville, asked the Court to carry out the registrar's report. As regards its interference with the respondent's power of appointment by will, he could not press that in the face of a decision by Sir C. Cresswell in *Seatle* v. *Seatle.* (1)

Dr. Swabey, for Mrs. Roupell. The respondent gives up her life interest under the husband's settlement, which amounts to more than 200*l.* per annum, and as all the children under their father's will have what he considered a sufficient maintenance for their position in life, the respondent ought not to be compelled to do more for them.

Dr. Middleton appeared for the trustees.

SIR J. P. WILDE. I think the proposition made on behalf of the respondent is reasonable, and that I should only order her to surrender, for the benefit of the children, her interest in that por-

(1) 30 L. J. (P. M. & A.) 216.

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tion of the property settled which came from the husband. It is not right that the Court should strip the wife of the means of a reasonable subsistence. The question I have to determine is one of figures. It is admitted on behalf of the husband that the income the respondent will retain is not more than is reasonable in her station of life, and, on the other hand, it is not extravagantly great in comparison with what these children are entitled to, namely, 100*l.* per annum each under their father's will. I shall not, therefore, interfere with the wife's income beyond what I have already stated.

On application of counsel, the Court ordered the costs of the petitioner, Mr. Granville, and of the trustees, to be paid by the co-respondent.

Attorney for Mr. Granville: *A. R. Cocker.*
Attorneys for respondent: *Warry, Robins, & Burgess.*
Attorneys for trustees: *Senior, Attree, & Johnson.*

Dec. 8.

MORDAUNT *v.* CLARKE AND CLARKE.

Will—Executors intermeddling—Citation to take Probate—Failure to do so—Attachment—Practice.

The executors appointed in the will of a deceased intermeddled in the estate, but did not take probate of the will. Having been cited to do so, and not having obeyed the citation within the time limited by it, an attachment was applied for against them. The Court refused to order an attachment in the first instance, but directed that a peremptory order should be served upon them to take probate within ten days.

JOSEPH BELL CLARKE, formerly of Cheltenham, in the county of Gloucester, but late of Alderley Villa, Chorley, Cheshire, cotton manufacturer, deceased, died on the 5th of September, 1863, having made his will, bearing date the 13th of November, 1855, and thereof appointed his sons, Daniel Ames Clarke and Henry George Clarke, and his daughter, Mary Clarke, spinster, executors. By an indenture, dated the 22nd of February, 1854, a sum of 5000*l.* was lent to the deceased by Anna Frances Grant, of Cheltenham, widow, on the security of a certain property belonging to the deceased, and situate at Holt Town, Manchester. Mrs. Grant died on the 27th of December, 1867, having made her will, in

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which she appointed the plaintiff, Octavius Dillingham Mordaunt, one of her executors. Application having been made to the deceased's executors for the repayment of the money so lent, but in vain, proceedings were instituted in the Court of Chancery against the defendants to administer the estate of the deceased. Daniel Ames Clarke and Mary Clarke filed an answer, dated the 30th of October, 1868, in the Chancery suit, in which they admit that they have possessed themselves of personal estate and effects of the said Joseph Bell Clarke, deceased, of considerable value, and have called in and caused to be sold a portion thereof, and thereby realized the sum of 205*l.* 18*s.* 9*d.*, and have thereby intermeddled in the estate and effects of their testator, although they have not taken upon themselves or either of them probate of his will. On the 20th of November, 1868, a citation issued from the Court of Probate, calling upon the defendants, within eight days after service, to cause an appearance to be entered in the registry, and to take upon themselves the probate and execution of the will of Joseph Bell Clarke, deceased, under pain of the law and contempt thereof. This citation was personally served upon the defendants on the 23rd and 24th of November. An appearance was entered thereto by the defendants on the 25th of November, 1868, but no steps have been taken by either of them to obtain probate of the will.

Searle moved that a writ of attachment should issue against the defendants for contempt, in not taking upon themselves the probate of the will of the deceased in pursuance of the citation. The suit in Chancery is stopped for want of a representative to the deceased. Notice of this application has been served upon the defendants' solicitors, Messrs. Milne.

SIR J. P. WILDE said he did not think there had been any case in which a writ of attachment had issued against a party in the first instance for non-obedience to a citation such as this. He thought the proper course would be to make a peremptory order upon the defendants to take probate within ten days from the date of the order, and to condemn them in the costs.

Proctor for applicant: *N. Robarts.*

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April 21.

HAWKE *v.* WEDDERBURNE.

*Administration—Residuary Legatee and Creditor—*20 & 21 *Vict. c.* 77, *s.* 73.

1 P D 439.

The Court will not exercise the power conferred on it by the 73rd section of the 20 & 21 Vict. c. 77, by passing over a person entitled to a grant of administration in favour of a creditor when the fact of the insolvency of the intestate is disputed.

John Hawke died on the 21st of April, 1867, leaving a will of the 20th of April, 1867, in which he appointed his wife, Ann Nichol Hawke, residuary legatee for life, and named no executor. A caveat was entered by C. A. Wedderburne and others, as creditors of the deceased; and the case now came before the Court upon the question of the appointment of an administrator pendente lite. Affidavits were filed by the creditors to the effect that the estate was insolvent; and affidavits were filed on behalf of the widow, who claimed the grant, to the effect that the estate was solvent.

Inderwick, for the creditor, moved for administration pendente lite to Mr. Rossdike, an accountant. The creditor claimed the grant under the 73rd section of 20 & 21 Vict. c. 77.

Patchett, for the widow, opposed the motion. There is no ground for passing her over in favour of a creditor.

Sir J. P. Wilde. Before the passing of the 73rd section of the Probate Act (1) the Court could not have entertained such an application as this on behalf of a creditor, but would have been bound to make the grant to the widow, if she applied for it. No doubt the 73rd section gives the Court the power to pass over a residuary legatee, or even an executor, if certain special circumstances are shewn to exist. In this case no special circumstances are alleged, but it is merely suggested that the estate is insolvent. An estate may be apparently insolvent, and yet property may be forthcoming from some unexpected source, after all the debts have been paid. A creditor who had obtained a grant would be entitled to receive such property, although his debt had been

(1) 20 & 21 Vict. c. 77.

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discharged. In this case the fact of the insolvency of the estate is disputed, and affidavits on both sides have been filed. Where there is any doubt as to the fact of the insolvency of the estate, the Court clearly ought not to pass over the persons entitled under the statute in case of intestacy or under a will, although the words of the 73rd section may perhaps be wide enough to give it power to do so. The principles upon which this Court has made grants to creditors are explained in *Dabbs* v. *Chisman* (1); *Elme* v. *Da Costa* (2); and *Menzies* v. *Pulbrook.* (3)

I grant administration with the will annexed to the widow; and as the application of the creditor is contrary to the practice of the Court, I condemn him in the costs.

Attorney for plaintiff: *J. C. Cotton.*
Attorney for defendant: *W. J. Holt.*

IN THE GOODS OF BIGGS.

June 23.

Renunciation by Married Woman with consent of Husband—Grant to Husband as Creditor—Non-Contentious Rule 50.

A husband may take a grant of administration, with the will annexed, as creditor, although he has signed a renunciation executed by his wife as residuary legatee.

THOMAS BIGGS died on the 2nd of April, 1868, leaving a will dated the 30th of March, 1868. The estate was insolvent, and the executors and residuary legatees filed renunciations of probate and administration with the will annexed. One of the residuary legatees was Elizabeth Caffyn, the wife of Richard Caffyn, and her renunciation contained a declaration that it was made with the consent of her husband, testified by his executing the instrument, and it was signed by him.

Richard Caffyn afterwards applied for administration with the will annexed as a creditor. A question was raised in the registry whether the fact of having signed the renunciation executed by his wife did not take away his right to the grant, as one of the

(1) 1 Phill. at p. 159. (2) 1 Phill. at p. 177.
(3) 2 Cur. at p. 848.

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rules (1) provides that no person who renounces probate or administration in one character is to be allowed to take a grant in another character.

Dr. Middleton moved for the grant to Mr. Caffyn. His consent to his wife's renunciation does not take away his right to the grant.

THE COURT ordered the grant to issue to Mr. Caffyn.

Proctors: *Moore & Currey.*

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Jan. 26.

IN THE GOODS OF JOHN HUTLEY.

Citation—Affidavit to lead—Applicant abroad—Agent—Practice.

A party interested in the property of the deceased, who desired to call in the probate of his will, and to put the executors to the proof thereof, resided in Tasmania. The Court, on an affidavit that the estate of the deceased was about to be distributed by the Court of Chancery amongst those who claimed it under the will, allowed a citation to issue on an affidavit from the person authorized by a power of attorney to institute the suit on behalf of the party interested.

JOHN HUTLEY, late of Canterbury Villas, Maida Vale, West Paddington, and of Bloomsbury, Middlesex, wholesale cheesemonger and provision merchant, deceased, died the 30th of October, 1866, having executed a will, bearing date the 9th of December, 1865, in which he appointed Frances Maria Hutley, Percival Turner, Michael Gunston, and Susan Grimston (deceased), executors, to the three first of whom probate was granted in November, 1866. The deceased died a bachelor without a parent, leaving his brother Stephen Hutley, heir at law, and next of kin, and Henry Grimston, his nephew, a party entitled in distribution in case he had died intestate. The personal estate of the deceased was of the value of 90,000*l.*, and he was further possessed at the time of his death of freehold and copyhold lands and houses. Stephen Hutley subsequently instituted a suit in this court in order that the probate granted to the above-named three executors should be revoked and the will declared null and void; and he pleaded that such will was

(1) Non-contentious Rule, Principal Registry, 50; District Registry, 61.

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not executed in accordance with the statute; that the deceased was not of sound mind at the time he executed it, and that he did not know and approve of its contents. The questions raised in the suit came on for trial before the judge and a special jury on the 25th of July, 1867, when a compromise was entered into under which Stephen Hutley received 5000*l.* and his costs, and the Court pronounced for the will. Henry Grimston at that time resided, and still does reside at Hobart Town, Tasmania, and was not cited in, and was no party to that suit. A suit was subsequently instituted in the Court of Chancery by Frances Maria Timms and her husband, Godwin William Timms, for the administration of the estate of the deceased; and by an order of that court, dated the 6th of December, the compromise was confirmed, and directions given that it should be carried out and administration made. Henry Grimston was not made a party to the Chancery suit, and had no notice of the proceeding, but having become acquainted therewith, he forwarded to Mr. Edwin John Nunn, a power of attorney, which authorized Mr. Nunn, in the name of Henry Grimston, to take possession of any real estate, and to receive the rents and profits, and to collect, get in, demand, and receive, all and every the property and effects, sum and sums of money now due and owing, payable, or belonging to Henry Grimston, or which hereafter at any time may be due from the estate or legal representative of John Hutley, deceased; and also in the name of Henry Grimston, to commence and prosecute, appear to answer and defend any actions, suits, or other proceedings at law or in equity, which may be necessary, or by his said attorney deemed necessary or expedient for recovering, collecting, getting in and converting the said rent, sum or sums of money, property and effects as aforesaid.

Dr. Spinks, Q.C. (*E. C. Clarkson* with him), moved the Court to order a citation to issue calling upon the executors to bring in the probate of the will of the deceased and show cause why it should not be revoked, and the will declared null and void on the affidavit of Mr. Nunn as the attorney for Henry Grimston. The property will be entirely distributed unless the citation issues at once, and to obtain an affidavit from Mr. Grimston will occupy three months.

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In the Goods of Hutley.

Sir J. P. Wilde. The citation may issue. As the party resides so far off, the affidavit of his lawfully appointed attorney will answer all purposes.

Attorneys: *Paterson, Snow, & Co.*

Jan. 26.

In the Goods of D. F. DE ANGULO Y URRUELA.

Will—Executor abroad—Property sworn below its value—Probate not sealed—Affidavit of an Agent—Practice.

The deceased died domiciled in a foreign country, in which also the executor resided. The usual affidavits were forwarded to and made by the executor, and returned to this country. Before the probate passed under seal, it was discovered that the value of the property in England had been understated in the affidavits. The Court allowed probate to issue, with a stamp to cover the full value of the property of the deceased, on an affidavit by the agent of the executor in England being filed explanatory of the mistake, and of the real value of the personal estate liable to probate duty.

Damaso Francisco de Angulo y Urruela died domiciled at, and resident in Guatemala, Central America, on the 13th of June, 1866, having executed a will and codicil in accordance with the laws of Guatemala, by which he bequeathed such part of his property as by that law he was entitled to dispose of to parties resident out of the jurisdiction of the Court of Probate, and in which he named Don Raphael José Angulo y Urruela, of Guatemala, one of his executors. As the testator died possessed of considerable personal estate, in the hands of Messrs. C. de Murrieta & Co., Old Broad Street, in the city of London, an official copy of testator's will and codicil, duly certified, were forwarded to this country, and the usual affidavits were transmitted to Guatemala, and sworn to by the above-named executor, Don Raphael José Angulo y Urruela. The effects of the testator in this country were sworn in such affidavits to be under the value of 32,000*l.*; but before the probate passed under seal it was discovered that such effects in fact exceeded in value the sum of 35,000*l.*, but do not amount in value to the sum of 40,000*l.*; the error being occasioned by the omission, in calculating the value of the estate for probate, of certain foreign securities, which were supposed not

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to be, but which were in fact part of the testator's estate liable to probate duty. The agents of the executors offered to make an affidavit as to the increased value of the estate, and to pay the additional stamp duty, and the further fees for such value; but the registrar refused to allow the grant to be made on a stamp larger than sufficient to cover the amount under which the effects had been sworn by the executor.

C. A. Middleton moved the Court to decree probate of the will and codicil of the deceased to Don Raphael José Angulo y Urruela, and that the grant might be stamped to cover the sum of 40,000*l.* He submitted that the Court could receive an affidavit from the agent of the executor as to the real value of the personal estate, such agent being a competent person, within the meaning of the 38th section of 55 Geo. 3, c. 184.

SIR J. P. WILDE. The mistake which occurred in this case has been explained. The affidavit was made by a person residing on the other side of the globe, and the estate has turned out to be larger than was expected. In some way or other the mistake must be corrected, and the Court will be desirous to give its assistance to such object, unless there be anything in the Stamp Act to prevent it. I think there is nothing in the act to that effect. The 38th section says that no ecclesiastical court or person shall grant probate of the will . . . . of any person deceased, without first requiring and receiving from the person or persons applying for the probate, or from some other competent person or persons, an affidavit that the estate and effects of the deceased for or in respect of which the probate is to be granted . . . . are under the value of a certain sum, to be therein specified to the best of the deponent's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate." It is plain from this section that it is not intended to restrict the Court to granting probate on the affidavit of the applicant, whether the executor himself or his attorney; but it may take the affidavit of *any other competent person.* The grant may go, but it is proper that an affidavit should be filed by the agent as to the full value of the deceased's effects, and explaining how it is that the oath

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of the executor as to the value of the property differs from the amount endorsed on the probate. It has been suggested that the more correct course would be for the agent to apply to the Stamp Office, under the 41st section of 55 Geo. 3, c. 184, by which it is enacted that "where any person on applying for probate of a will shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall have, in consequence, paid too little stamp duty thereon, it shall be lawful for the said Commissioners of Stamps, on the delivery to them of an affidavit of the value of the estate and effects of the deceased, to cause the probate to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value," with a penalty which may be remitted by the commissioners, if they be satisfied on affidavit "that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud." The plain language of this section only authorizes the Commissioners of Stamps to intervene when the party applies to them after the probate has issued. In this case the mistake was discovered before probate had issued, and therefore the application is properly made to this Court, under the 38th section.

Attorneys for applicant: *Waltons, Bubb, & Walton.*

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March 17.

Desertion—Deed of Separation.

A husband and wife separated, and immediately afterwards executed a deed of separation, containing covenants on the part of the husband (the respondent) to allow the petitioner (the wife) 100*l.* per annum for the maintenance of herself and their infant son until he attained the age of fifteen, and also giving the petitioner the sole custody of their son up to that age. The respondent paid the allowance only for the first two quarters, and then went to India, and afterwards declined to pay it. The wife petitioned for a dissolution of her marriage on the ground of desertion and adultery:—

Held, that the execution of the deed by the wife was inconsistent with the charge of desertion; for even assuming that the covenant giving the wife the sole custody of the child would make the deed void in equity, and notwithstanding the failure on the part of the husband to perform his part of the contract, the separation was in the first instance voluntary, and being an act done under the deed, it could not be treated as if the deed had never existed.

Semble, that if a husband, determining to abandon his wife, were fraudulently, by a show of an agreement which he never intended to fulfil, to induce her to consent to a separation, such consent would be no answer to the charge of desertion.

PETITION for dissolution of marriage by the wife on the ground of adultery and desertion.

Jan. 24, 1868. *Dr. Spinks, Q.C.*, and *Dr. Tristram*, for the petitioner.

Searle, for the respondent.

The Court was satisfied with the evidence of adultery; but a question was raised whether the charge of desertion made by the wife was consistent with a deed of separation executed by the husband and wife at the time when they ceased to cohabit.

The facts material to this question were as follows:—The parties were married in June, 1855, and lived together until the month of September, 1857. There was an only child of the marriage born in April, 1857. For some time before and after the birth of the child the petitioner stated that the respondent had treated her with coldness, and had neglected her, and that in September, 1857, he left the house in which they were living in consequence of an altercation she had with him respecting a female servant. In the month of October, 1857, a deed of separation was executed by which the respondent covenanted that their infant son should be

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at all times under the sole care and control of the petitioner until he should attain the age of fifteen years, and that the respondent would pay the petitioner, so long as during their joint lives their said son should be living under her care and control, an annuity of 100*l.* by quarterly instalments towards the maintenance of herself and her child.

The annuity was paid for the first two quarters only after the execution of the deed of separation. The petitioner then made inquiries for the respondent, and heard that he had gone to India. He returned to this country about two years before the institution of this suit; she had since met him in the street, but they did not speak. She stated she would not have been a party to the deed if he had not covenanted to pay her the annuity.

The case was adjourned for further argument on the question of desertion.

Feb. 25. *Dr. Spinks, Q.C.*, and *Dr. Tristram*, for the petitioner. Although the petitioner by executing the deed must be taken at the time to have given her consent to the separation, yet such consent must be assumed to have been given conditionally, on the assumptions—First, that the deed was valid, and could be enforced against the respondent at law or in equity; and, secondly, that the respondent would perform his part of the contract. Both these considerations failed, for, first, the covenant giving the petitioner the sole custody and control of the child is against public policy, and vitiates the deed in equity: *Hope* v. *Hope* (1); *Vansittart* v. *Vansittart* (2); *Walrond* v. *Walrond* (3); *Swift* v. *Swift* (4); and would prevent the covenants being enforced at law: *Vansittart* v. *Vansittart*. (2) At the date of the execution of the deed there might have been some doubt on the effect of such a covenant; but subsequent decisions have placed the matter beyond doubt. And, secondly, the respondent failed to perform his part of the contract, having only paid to the petitioner the allowance—which was the inducement for her to consent to the deed—for the first two quarters. A consent given by the petitioner to a separa-

(1) 22 Beav. 351; 26 L. J. (Ch.) 417.

(2) 4 K. & J. 62; 27 L. J. (Ch.) 289.

(3) John. 18; 28 L. J. (Ch.) 97.

(4) 34 Beav. 266; 34 L. J. (Ch.) 209, 394.

tion under such circumstances ought not to be held to negative desertion.

Cur. adv. vult.

March 17. THE JUDGE ORDINARY. The broad question raised here is, whether a woman who has quitted her husband's house under a bargain to do so, made by a deed of separation, can be said to have been "deserted without cause" by him.

The proposition hardly bears stating, unless, indeed, all "separations," voluntary or involuntary, be "desertion,"—the consent of complaining parties unimportant and the person deserted, not he who was left in the common home, but she who quitted it. It was, however, argued that the deed in this case would have been held invalid in a court of equity, because its provisions stripped the father of all control and supervision over his child. It is needless to inquire whether this proposition is correct or not, because, in this Court at least, it has always been held that such deeds are utterly inoperative to abrogate the duty of cohabitation involved in the contract of marriage. And if the mere fact that this deed was impotent to maintain and enforce the permanent separation of the parties be material to this question, that fact may be found in the first principles of matrimonial law. For, no doubt it would have been quite competent to either party the day after they parted, in obedience to their mutual agreement, to come to this Court in defiance of that agreement, and obtain a decree for restitution of conjugal rights. Their separation, therefore, was not only voluntary at first, but has practically continued to be so.

Lastly, it was said that the husband did not fulfil his part of the bargain, and only paid the 100*l.* a year according to his covenant for one half year. This, if a condition precedent to the covenant of the wife's trustee that she should not attempt to enforce cohabitation in this Court, might, in another court, be held to relieve him from that covenant. In a word, if the husband's side of the bargain was not adhered to, the wife might have been remitted to her original status, and set free from the prohibitions contained in the deed against enforcing those rights which in this Court have never ceased to exist and lie open to her assertion. But the husband's breach of his contract could not by relation back make

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the actual parting involuntary, which was in fact voluntary, though the volition of the wife was moved by the husband's promises. The separation, it must always be remembered, was an act done under the deed, and though the deed be void, or its covenants afterwards broken, it would be most unjust to treat that act as if the deed had never existed. The failure of the deed cannot be held so to react upon the separation for which it provided, as to impress upon that separation a character entirely opposite to that which it bore at the time. If it could, it might as well be said that the wife had deserted her husband as that he had deserted her.

But all this presumes the absence of fraud, for if a man, determining to abandon his wife, were to set about fraudulently, by the show of an agreement which he intended never to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the Court might well be asked to reject the false face of the transaction, and regard the real object that lay underneath.

Solicitor for petitioner: *J. Wright.*
Proctors for respondent: *Brooks & Du Bois.*

July 21.

MACLEUR *v.* MACLEUR.

Jurisdiction of County Court—Costs—20 & 21 *Vict. c.* 77, *s.* 59.

After a testamentary cause has been transferred from the Probate Court to a county court, the Probate Court has no power to make an order as to the costs incurred before the transfer. The judge of the county court has power to make an order as to such costs.

THE plaintiff, by a declaration filed in the Court of Probate, propounded the will of Mary Macleur, late of Birmingham, widow. The defendant filed pleas in opposition to the will. On the motion for the mode of trial being made, an affidavit was filed proving that the value of the personalty was under 200*l.*, and the proceedings were thereupon transmitted to the judge of the county court of Warwick.

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The cause was heard in the county court, and on the 9th of July, 1868, the judge of the county court made a decree pronouncing for the will, and condemning the defendant in costs.

Pritchard, for the plaintiff, moved that the decree of the judge of the county court might be confirmed, and the defendant condemned in the costs incurred in this Court before the cause was transferred to the county court.

Searle, for the defendant. The motion to confirm the decree is unnecessary. The Court has no power to make an order as to costs after the cause has been removed to the county court: *Zealley* v. *Veryard.* (1)

SIR J. P. WILDE. The 59th section of the 20 & 21 Vict. c. 77, empowers the judge of a county court to proceed in a cause transferred from this Court as if such cause had arisen in the county court in the first instance. Before the case was transferred to the county court this Court had power to make an order as to the costs, and might have done so if an application had been made for that purpose. But as soon as the proceedings were removed from this Court it ceased to have power to make any order as to costs. The judge of the county court has full power to deal with the question of costs, and if he had thought proper might have included in his order, condemning the defendant in costs, the costs of the proceedings in this Court from the commencement of the contentious proceedings. I reject this application with costs.

Attorneys for plaintiff: *Walker, Twyford, & Belwan.*
Attorney for defendant: *H. C. Barker.*

(1) Law Rep. 1 P. & D. 195.

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Nov. 10.

IN THE GOODS OF WILLIAM PASCALL.

Incorporation of Document—Will—Instructions.

The testator, in his will, desired that instructions previously given by him the same day to an attorney's clerk, should be carried out. The instructions were oral, but the clerk had at the time made short notes of them in testator's presence:—

Held, that the notes could not be included in the probate.

WILLIAM PASCALL, late of Bowdon, in the county of Chester, died on the 25th of September, 1868, a widower, leaving three children, namely, Ann Guest Pascall, William Ernest Pascall, and Henry Frederick Pascall, the two last being under age. At six o'clock on the afternoon of that day, at the request of the deceased, Joseph Yates, clerk to Messrs. Whitworth, solicitors, attended upon him to take instructions for his will. The instructions then given were written down, in the deceased's presence, in the following form:—

"John Wallworth, of the city of Manchester, superintendent of the scavenging department. James Wallworth, estate agent, Manchester. Daughter Guest Pascall, spinster.

Wm. Ernest Pascall. } 50*l.* to sister
Henry Frederick P. } Easter Gadd, widow.

Property consists of 2 houses in Hale, mortgaged to Lees.
2 do. do. Miss Holland
4 houses, Helston, mortgaged to Lees.
Great Jackson Street property.
Stock in trade. Policy for 1000*l.* in the Star Assurance Company.
To pay off mortgages, &c., at once."

The intention of the deceased was that his business should be discontinued immediately upon his decease, and that the mortgages should be paid off out of the proceeds of his life policy, stock in trade, and other personal property, and that his land, houses, and furniture should not be sold, but divided equally amongst all his children upon the youngest of them attaining the age of twenty-one, and that the portion of his daughter should be settled to her separate use. After taking the instructions the clerk left the house. Shortly afterwards the deceased became rapidly worse, and at about half-past eight o'clock, on the suggestion of his

medical attendant, he signed, in the presence of two witnesses, Samuel Kenworthy and Easter Gadd, the following document:— "The instructions given this Tuesday, August 25th, 1868, to Messrs. Whitworth's clerk, I desire to be carried out. I subscribe my name, Wm. Pascall." This document was duly attested. The date of August, instead of September, was a mistake. The deceased died at nine o'clock that evening.

Pritchard moved the Court to grant probate of this memorandum, and of the instructions written by the clerk in the deceased's presence, as together containing the will of the deceased.

[SIR J. P. WILDE. It is questionable whether they can be called instructions at all. They were merely notes made by the clerk, and expressing only a small part of the intentions of the deceased. There is nothing in the notes from which to discover what is the real will of the deceased. The instructions, although given, were never put into writing, and the subsequent memorandum only shews the deceased's adhesion to the *instructions*. Is there a reference to an existing document in terms which distinctly identify it?]

There was a document taken down in the presence of the deceased. Although the instructions were oral, they were partly reduced into writing, and the part reduced into writing ought to be admitted to probate.

SIR J. P. WILDE. The Court cannot grant probate of these papers on motion, but the parties interested may propound them if they think proper. Before the Court can make a grant it must be satisfied that at the time the testator signed the paper he intended to refer distinctly to some document in existence, of which he had cognizance, and that he gave it a definition by which the Court is able to identify it. The circumstances are shortly these:—The testator sent for the clerk of his attorneys, and gave him instructions to prepare a will. The clerk made notes of the instructions so given to him. Subsequently the testator, being in a state of great danger, executed a paper to the following effect: "The instructions given this day to Messrs. Whitworth's clerk I desire to be carried out." The question is, does this memorandum refer to some written paper then in existence? I am of opinion it does

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IN THE GOODS OF PASCALL.

not. Although the clerk made some meagre notes, they did not contain in substance the instructions of the deceased. Indeed there is no evidence that the testator knew the contents of these notes, or even of their existence further than that he saw the clerk writing something at the table.

Attorneys: *Walker, Twyford, & Belward.*

Nov. 17.

SPRIGGE *v.* SPRIGGE.

Lost Will—Presumption as to Revocation—Insanity of Testator after Execution —No Evidence of Destruction.

The presumption that a will which was in a testator's custody up to the time of his death, and cannot be found after his death, was destroyed by him animo revocandi, does not apply to a case where the testator became insane after the execution, and continued insane until his death. In such a case the burden of shewing that the will was destroyed whilst the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction, the contents of the will are entitled to probate.

THE testator, Oliver Sprigge, was a surgeon at Peterborough. On the 15th of September, 1858, immediately after his marriage, he duly executed a will in favour of his wife, and of any children who might be born of the marriage. In 1863 he became of unsound mind, and in November, 1865, he was confined in a lunatic asylum, where he remained until his death on the 3rd of December, 1867.

The plaintiff, as executrix, propounded the contents of the will as contained in a copy. It was proved that the will was the same as the copy propounded; that after the execution it was in the custody of the deceased, and it remained in his custody; that after his death search was made for it, and it could not be found. There was no evidence of destruction of the will, and the latest date at which it was proved to have been in existence was about two months after its execution, when it was seen in the deceased's desk. The defendants, who were the children of the marriage, and the only next of kin of the deceased, appeared by their guardian and pleaded a revocation. The cause came on for hearing before the Court, without a jury.

Nov. 5. *Dr. Deane, Q.C.*, and *Dr. Tristram*, for the plaintiff. *Pritchard*, for the defendant.

Cur. adv. vult.

Nov. 17, 1868. SIR J. P. WILDE. The question in this case is whether, under the circumstances that happened, the Court ought or ought not to consider that the will had been revoked—the fact being that it remained in the custody of the testator from the time when it was made, and that upon his death it was not to be found. The presumption of law in this state of things, under ordinary circumstances, is, that it was destroyed animo revocandi. It appeared in this case that the testator, during a considerable portion of the time that elapsed between the making of the will and his death, was insane. The question, therefore, arises, whether the Court ought to apply the ordinary presumption of law to such a case. The case of *Harris* v. *Berrall* (1) was cited, and I am of opinion that it is an authority directly in point. The will in that case had been mutilated not destroyed, and the question was, whether it had been mutilated animo cancellandi; the deceased having been insane during a portion of the time between the execution and her death. Sir C. Cresswell said (2): "If there had been no evidence to fix one time or another for its mutilation, I still think that it would have been entitled to probate. By 1 Vict. c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is also shewn that it has been revoked by one of the several modes pointed out by that statute; and I am of opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation. One of the modes of revocation pointed out by the statute is tearing with an intention to revoke; but an insane person cannot be said to have any intention. The will in this case was in the custody of the deceased at the time she was of unsound as well as of sound mind. Shortly before her death it was discovered to have been torn by her. The burden of shewing that it was not done after she became insane, but at a time when she was of sound mind, is cast upon the plaintiff who sets up the revocation of the instrument." I entirely agree

(1) 1 Sw. & Tr. 153. (2) 1 Sw. & Tr. at pp. 154, 155.

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SPRIGGE v. SPRIGGE.

with the opinion of Sir C. Cresswell, and the principle which he lays down as to a case of mutilation, applies equally to a case of destruction. The short proposition is, that the burden of shewing that the revocation was done not after the testator became insane, but when he was of sound mind, is cast on those who set up the revocation. In this case there was no evidence to shew when it was done. Therefore those who sought to set up a revocation failed in establishing the facts on which the presumption of revocation would rest. The paper propounded by the plaintiff is entitled to probate. The costs of all parties will be allowed out of the estate.

Attorneys for plaintiff: *Chilton & Co.*
Attorney for defendant: *T. Kennedy.*

Dec. 15.

HOLT *v.* HOLT AND DAVIS.

Alimony pendente lite—Respondent supported by Co-respondent.

A respondent is not entitled to alimony whilst she is living with the co-respondent as his wife, and supported by him.

PETITION by a husband for dissolution of marriage.

The respondent having filed a petition for alimony, the petitioner in his answer, after setting out that his income amounted to about 500*l.* per annum, alleged that, from the time of the filing of the petition, and of the service of the citation in February, 1868, up to the 21st of August, 1868, the respondent was living with the co-respondent as his wife, and was supported by him.

Affidavits were filed in support of these allegations.

Searle, for the petitioner. The alimony ought to run from the 21st of August instead of from the service of the citation, as up to the 21st of August the respondent had other means of support.

Dr. Swabey (*Thomas* with him), for the respondent.

THE JUDGE ORDINARY. A primâ facie case is made out; but the respondent may have time to answer the affidavits if she applies for it.

Dr. Swabey did not apply for time to answer them.

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HOLT v. HOLT.

THE JUDGE ORDINARY. It is proved that the respondent was living as the wife of the co-respondent up to the 21st of August, 1868, and was supported by him during their cohabitation. I think the husband ought not to be called on to pay alimony for the time during which the wife had other means of support. It is immaterial, as far as this question is concerned, whether the respondent was living in adultery. The ground upon which the Court proceeds is, that she was living in such a manner that she had means of support independent of her husband. Taking the income at 500*l.*, I allot alimony pendente lite at the rate of 100*l.* per annum, to commence from the 21st of August, 1868.

Proctor for petitioner: *Wills.*

Attorney for respondents: *W. J. Webster.*

SHARPE AND SHARPE *v.* CRISPIN.

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Feb. 9.

Domicil—Change from Portuguese Domicil—Education in England—Lunatic from his Majority—Dependent on Father's Domicil—Consular Office—Interest Suit.

12 Eq. 684.

If a man at the time he attains his majority is of unsound mind, and remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicil for his son, and a change of domicil by the father will usually produce a similar change of domicil as regards the lunatic son.

The mere residence as a consular officer in a foreign country gives rise to no inference of a domicil in that country. But, if one already domiciled and resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicil.

GEORGE RICHARD CRISPIN, of Stoke Newington Green, in the county of Middlesex, died on the 1st of September, 1862, leaving a duly executed will dated the 26th of January, 1857, wherein he named his cousins, Frederick Sharpe and Sibilla Sharpe (the plaintiffs) executors.

A caveat having been entered an appearance was given for the defendant, after more than one amendment, in the following form: —"Mr. Mercer appears for the defendant, Francisco José Cortes

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Crispin, who is the natural son of Henry Crispin, deceased; and as such natural son is by the law of Portugal one of the next of kin, and a party interested in distribution in the estate and effects of the said deceased in case of an intestacy, the said George Richard Crispin having been a native of Portugal and domiciled there, and having died after his parents unmarried and without children." The defendant's interest having been denied by the plaintiffs, he filed a declaration in an amended form as follows:—"Francisco José Cortes Crispin by John Sharp Mercer, his attorney, saith that George Richard Crispin, deceased, formerly of Oporto, in the kingdom of Portugal, and domiciled there, and being so domiciled died on or about the 1st of September, 1862, at Stoke Newington Green, in the county of Middlesex, intestate and unmarried, without child, parent, brother, or sister, and that the said Francisco José Cortes Crispin is the natural son of Henry Crispin, deceased, the uncle of the deceased George Richard Crispin by a woman between whom and the said Henry Crispin no impediment to marriage existed, and as such natural son he is by the law of Portugal one of the next of kin of the deceased, and a person entitled in distribution to the personal estate and effects of the deceased in case of intestacy."

The plaintiffs pleaded: 1. They deny that George Richard Crispin, the deceased in this cause, was domiciled in Portugal at the time of his death as in the declaration alleged. 2. They deny that the said defendant is the natural son of Henry Crispin, deceased (the uncle of the deceased), by a woman between whom and the said Henry Crispin no impediment of marriage existed. 3. They deny that the defendant is by the law of Portugal one of the next of kin of the deceased, or a person entitled in distribution to the personal estate and effects of the deceased in case of intestacy. 4. They further say that the said George Richard Crispin, deceased, was domiciled in England at the time of his death. 5. They submit to the judgment of the Court that the said Francisco José Cortes Crispin has as yet no right to raise the issue whether the said George Richard Crispin, deceased, died intestate as in the declaration alleged.

Issue was joined on the first four pleas, and the cause was heard on the 13th and 14th of January by the Court itself without a jury.

The evidence given on commission and in court proved the following dates:—That John Crispin, the father of the deceased, was born in January, 1769; but whether in Ireland, where his father was married, or at Faro, in Portugal, was not distinctly ascertained. Shortly after his birth he was in England, and in 1792 he was connected with the British Consulate at Lisbon. In 1801 he married an Englishwoman, and from 1801 to 1804 he managed the business of Messrs. Holford and Gonne at Lisbon. In 1804 George Richard Crispin was born at Lisbon, and in 1806 John Crispin lost his wife. In 1811 John Crispin was appointed British Consul at Oporto, and some years before 1812 George Richard Crispin was sent over to England for his education. He was in 1823 at Oporto assisting his father in his consular duties. In 1826 George Richard Crispin returned to England. In 1830 he was under the care of Dr. Probyn, having been under medical treatment even before that time. In 1832 John Crispin was made British Consul at Corunna, where he remained until 1843, when he retired from the consular service on a pension, and resided in England until his death in 1846. George Richard Crispin was in the year 1840 removed to Dr. Atkins's lunatic asylum at Stoke Newington, at which he died in 1862, having been declared a lunatic on inquisition in 1858.

Giffard, Q.C., and *Inderwick*, for the defendant. The deceased, born in Portugal, and a member of a family which had carried on business in Portugal fifty or sixty years, had his domicil of origin in that country, and never did any act to acquire a different domicil. Such an act can only be done by one capable of forming a determination, and of exercising a will of his own, but the deceased during the whole period of his majority was more or less under confinement and medical treatment as a lunatic.

Dr. Spinks, Q.C., and *Dr. Tristram*, for the plaintiffs. There is some evidence that John Crispin, the father, was born in Ireland; but even assuming that he was born in Portugal, he was in England at an early period of his life and at the age of twenty-three, and from that time until 1843 he was in the British consular service. A residence in Portugal as a British public officer would not affect his domicil.

[SIR J. P. WILDE. I take it to be clear that a person domiciled

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in England, and going abroad either as an ambassador or consul would not in any way, by the fact of his residence in a foreign country, alter his domicil. That residence would be referred to his official duties, and would have no influence on the question of domicil. But, on the other hand, it is quite competent for the English Government, or the Crown, to appoint as their consul a man of English extraction whose family had been established at the place, say Bordeaux, for two or three generations. The question then would arise, would the mere clothing such a man (up to that period a domiciled Frenchman) with the character of a British consul affect his domicil?]

It seems that it would do so, provided he acted simply as consul, and did not take any part in trade: Halleck on International Law, ch. 10, on Consuls and Commercial Agents, ss. 4, 5, 7, 8. When John Crispin retired from the consular service he received a pension from the British Government, and resided permanently until his death in this country. If the son at no time after he came of age was capable of choosing a domicil, his domicil must have continued the same as his father's, and whether the father's domicil was British from 1792, when he entered the consular service, or from 1843 when he began to reside permanently in England, the domicil of the deceased at his death was British: Phillimore on Domicil, ss. 100, 101. But the evidence fails to show that at all times after 1826 George Richard Crispin was non compos mentis; and if at any time he was capable to choose a domicil, by his acts he shewed a marked preference for England. He referred to *Heath* v. *Samson* (1), *Maltass* v. *Maltass*. (2)

Inderwick, in reply. The evidence distinctly shews that the domicil of origin of the deceased was in Portugal, and it is for the plaintiffs to prove that the deceased had an intention to change such domicil, and made such declaration, did such acts, and so conducted himself as to show such an intention. All that is shewn is a mere residence in England, which is not sufficient. He never in any way managed his own affairs, and from the age of eighteen he was in a state of gradually increasing imbecility, and therefore never capable of forming an intention to become domiciled in

(1) 14 Beav. 441. (2) 3 Curt. 231; 1 Robert. 67.

England. He referred to *Moorhouse* v. *Lord* (1); *Lord* v. *Colvin* (2); *Crookenden* v. *Fuller*. (3)

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Cur. adv. vult.

Feb. 9. SIR J. P. WILDE. George Crispin died in this country on the 1st of September, 1862; and the question now before the Court is, whether at the time of his death he had a Portuguese domicil. His family was English or Irish by extraction. He was born in 1804, and lived all his life in England, with the exception of two or three years during which he was in Portugal with his father, who was the British Consul at Oporto. But residence is no absolute test of domicil, and the very peculiar facts of this case render it one in which it is not easy to apply with confidence the recognized principles of the law. It must be admitted at the outset that on the 11th of January, 1804, when George Crispin was born, the domicil of his father, whose name was John, was Portuguese. For John was the son of William, who had settled at Faro, in Portugal, in the middle of the last century, had established a valuable mercantile business there, and had there lived till his death under circumstances which shewed that he had abandoned his original domicil for that of Portugal. The domicil of origin of John, his son, was therefore Portuguese. The date of his birth was the 7th of January, 1769, and there is evidence that soon after his baptism he was sent to England. His subsequent movements in the earlier part of his life were not in evidence, but he was shewn to be in Lisbon in 1792, when he was about twenty-three years old. He was shewn again to be in Lisbon in 1799. On the 5th of April, 1801, he married in Lisbon, and in 1811, at the time when he received his first appointment as British consul at Oporto, he is represented as a merchant carrying on business in Lisbon. In these facts, which were all that the evidence revealed, it is impossible, I think, for the Court to read an intention up to this time (1811) to abandon his Portuguese domicil of origin for that of England or any other country. John was therefore a domiciled Portuguese in 1804, and George, who was then born to him, had a Portuguese domicil as his domicil of origin. Starting from this

(1) 10 H. L. C. 272; 32 L. J. (Ch.) 295. 9 Jur. N.S. 677.

(2) 4 Drew. 366; 28 L. J. (Ch.) 361. 5 Jur. N.S. 351.

(3) 1 Sw. & Tr. at p. 454. 5 Jur. N.S. 1222

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point it was ably and forcibly argued that George said nothing and did nothing in the course of his life from which the Court could infer a deliberate resolve on his part to surrender his Portuguese domicil and replace it by an English one. That such an inference could alone, in the eye of the law, destroy his domicil of origin is apparent from the numerous authorities which exist on this subject, confirmed as they are by the decision of the House of Lords in the case of *Moorhouse* v. *Lord*. (1) The great difficulty which besets this part of the case lies in the fact that George Crispin, always of somewhat weak mind, was certainly as early as 1829 or 1830—probably even earlier—unfit, from mental incapacity, to manage his own affairs, or be employed in any business or occupation, and that from that time to his death he was more or less constantly under medical supervision and control as a person of unsound mind, having in the year 1858 been actually found lunatic under a commission. It was argued, on the one side, that he was non compos mentis from the time his father took him, still a minor, from this country to Portugal, in 1823 or 1824. It was argued, on the other, that his mental incapacity did not shew itself until the later period of 1829 or 1830. It would be no easy task to ascertain, upon the very meagre evidence which the great lapse of time has left at command, what was the precise period at which his mental faculties so far failed him as to make him incapable of a choice of domicil. Nor is it necessary, for in my judgment both alternatives lead to the same result. I propose to deal with them separately. Assuming, then, the first to be true, namely, that from a time before his minority expired—that is, 1824—continually down to the period of his death, he was of unsound mind, the question arises whether anything, and if so, what, happened which could destroy his domicil of origin. Now, his father, John Crispin, as I have already pointed out, was in 1811 a domiciled Portuguese. In that year he became British consul at Oporto, where he remained till the year 1832, when he was removed, as British consul, to Corunna, in Spain. Some stress was laid in argument on this fact of his having thus devoted himself to the British service as consul. But in my judgment it had no bearing on the question of his domicil. Residence in a

(1) 10 H. L. C. 272; 32 L. J. (Ch.) 295.

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foreign country as a consular officer gives rise to no inference of a domicil in that country. But if already there domiciled and resident, the acceptance of an office in the consular service of another country does nothing to destroy the domicil. In the year 1843, being of advanced age, John Crispin determined to retire from the consular service, and came over to this country apparently for the purpose of doing so. On the 10th of June, 1843, he wrote a letter to the Foreign Office, in which he said, "I have served my country since the year 1792," and that he wished to retire with a pension. The pension was allotted to him, and he took up his residence at Richmond, in Surrey, where he lived from that time down to 1846, in which year he died. It should be stated that his wife, who had died just forty years before, was an Englishwoman, and that her mother and sister had, from the beginning of the century, lived at Richmond. It should be further stated that, from his earliest years, John Crispin had apparently had no connection with the business at Faro, nor was he shewn to have been resident there. On the contrary, he was, soon after his coming of age, shewn to have been in Lisbon assisting in the consular office; and it must be further borne in mind that whatever mercantile pursuits engaged his attention in Lisbon during the years which immediately preceded his consular appointment in 1811, from that date he wholly ceased, in obedience to the rules of the consular service, to take any part in mercantile affairs. In this state of things, there existed in 1843 few ties with Portugal to be broken. He was not bound to that country by ties either of family residence or business association, and the fair presumption from his conduct in 1843, when he claimed his pension, retired from active life, and took up his residence in this country, is, in my judgment, that he meant from that time to make England his home. In 1843 John Crispin became, I think, a domiciled Englishman. The question then arises, what effect had this change of domicil upon the domicil of his lunatic son? It seems to have been considered as tolerably free from doubt that the domicil of a minor follows that of his father, and the better opinion seems to be that, after the father's death, even the mother may, by changing her domicil, affect the domicil of her minor children. I can find no authority which defines the effect of a change of domicil in

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the father upon a lunatic son. It would probably depend upon circumstances. If a man had grown up, married and established himself in business in the country of his original domicil, and had afterwards become lunatic, and in that state had been taken charge of by his father, the emigration of his father to a foreign country with the view of becoming domiciled there, taking his son with him, might fail to work a change in the domicil of that son. It is not difficult to conceive cases in which great injustice might be done to the interests of others, if the general proposition were admitted that the custody of a lunatic necessarily carried with it the power of changing his domicil at will. But the hypothesis under which I am now considering the circumstances of the present case is free from the necessity of asserting any such general proposition. For I am assuming that George Crispin was of unsound mind throughout his majority,—in other words, that there never was a period during which he could think and act for himself in the matter of domicil otherwise than as a minor could. And if this be so, it would seem to me that the same reasoning which attaches the domicil of the son to that of his father while a minor would continue to bring about the same result, after the son had attained his majority, if he was continuously of unsound mind. The son in this case continued under the control of his father, was presumably supported by him, and, if he had not already been in England when his father returned hither in 1843, would, it may reasonably be presumed, have been brought with him. At no period could he, according to the hypothesis, have acted for himself in choosing a domicil, and if his next of kin and those who had the control of his movements and life were not capable of changing his domicil, that domicil would, from the moment of his majority, have become indelible. The better opinion, in my judgment, is, that the incapacity of minority never having in this case been followed by adult capacity, continued to confer upon the father the right of choice in the matter of domicil for his son, and that in 1843, if not before, that right was exercised by the adoption of an English domicil for himself which drew with it a similar domicil for his son.

I now proceed to examine the other alternative, namely, that there was a period of longer or shorter duration after George Crispin came of age on the 11th of January, 1825, during which he was capable of

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selecting a domicil for himself. Did he do so? and (that is the question) did he voluntarily adopt England as his home and domicil with the intention of renouncing and abandoning the Portuguese domicil which his origin had conferred upon him? I was much struck with the argument that such a resolve ought to be indicated by some acts or words of a marked character from which definite intentions of a permanent nature might be safely collected. But while admitting this as a general proposition, it is, I think, sufficiently obvious that the mode in which a man may be expected to evidence his intentions on such a subject must vary indefinitely with the age, character, circumstances and general conduct of the individual. In canvassing the words and actions of a youth just emerging from minority, and still wholly dependent on his father, one would not expect the intention, if it existed, of making England his home to be evidenced by such acts as would be likely to attend the resolve of a matured man of business. Nor, would it be reasonable to look for conduct such as might be evinced by a healthy, energetic youth, in the full use of his faculties, in one who was neither healthy nor energetic, and whose mental faculties were weak, if not yet unsound. I am far from saying that this last condition dispenses with the proof of the intention in question, or that the existence of the intention in all its fulness and completeness must not be arrived at by the Court before a change of domicil can be declared. But I am speaking of the media of proof, and I hold it to be unreasonable to require any further proof to this end than the individual, such as he really was, might fairly be expected to have furnished in the circumstances in which he was placed, if he had, in fact, really and truly entertained the intention of which we are in quest. What, then, was George Crispin; what his previous life; and what his conduct, after he came of age, and before he became imbecile? The date when he was sent to England is not in evidence. But in 1814, when he was 10 years old, he is spoken to as living at a school at Twickenham, and spoken of as having been there some time. Here George Crispin remained till 1820, or 1821, spending his holidays with his mother's sister, Miss Hair, who lived at Richmond. With this aunt he continued to reside until about the year 1823 or 1824, when his father took him over from England to Oporto,

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with the view apparently of bringing him up in the Consular Office. The day of his majority found him still residing with his father, where he remained till 1826 or 1827, when he returned to his aunt in England. It is to be gathered from the evidence that he was not able to render his father the assistance he expected. There is no proof of the exact circumstances which attended his return; but there is strong evidence in the testimony of the French master at the school where he had been educated, of his feelings and desires while resident in Portugal, and of the light in which he contemplated his return to this country. His letters to this gentleman during his stay in Portugal were "desponding;" he expressed a "dislike to be there;" he thought "the climate did not agree with him;" he said he was "always subject to headache;" and, in his last letter, he said, "I hope I shall return to England very shortly." He further said that what kept him in Portugal was his father's wishes, and that he disliked his stay in Portugal very much. Upon his return to England, this same gentleman had several conversations with him, in which he expressed a similar dislike to the country, the people, and their habits. Another witness, Mr. Chapman, says he came to London with George Crispin and his father, when they were about to start for Portugal. He describes him as "very loath indeed to go. I think he felt he must go as a matter of duty to his father." This same gentleman saw him upon his return, when he said that he did not like Portugal, "that the habits of the people were so different from what he had been accustomed to in England, that it was very distasteful to him." It is reasonable, I think, to infer from these statements that this young man, who had been entirely brought up in England with his aunt, was attached to this country, and that as soon as his father permitted it, he put an end to his enforced residence in Portugal, returning to England as his home. True, he took no steps to establish himself in business in this country. It is true also that he did no act beyond that of his eager return hither to sever the ties which bound him to Portugal as his original domicil. But those ties were of the slightest. Except in the eye of the law they had no existence. His language, his nurture, his habits, the family of his mother, and, by extraction, the family of his father, were all English. His actual relations

with Portugal were those of an enforced and temporary residence, distasteful in the outset, repellent throughout, and escaped from with alacrity. The evidence that a man desires to resign his domicil of origin ought to be cogent in proportion to the improbability of such a desire. And the converse is true—that if the probability is great, far less evidence may suffice.

On the whole, I do not hesitate to conclude that had this young man been asked, on his return to England, whether he desired to make England in future his home, and surrender all connexion with Portugal, he would have answered in the affirmative. And if that was his true state of mind, did he not evidence his intention in the only way in which he could be expected to do it? As for setting up in business, or establishing an independent home for himself, in this country, he had not the capacity or the means for either. He did the only thing which in his condition and circumstances he could do, continue to reside with his aunt, and be maintained, it is presumed, by his father. And if the means of determining his true state of mind by marked and definite acts were less ample than might have been desired, the conclusion to be drawn from all that he really said and did is not, in my judgment, the less certain. Assuming, then, that George Crispin was of sufficient capacity after he came of age to select a domicil for himself, I am of opinion that he did so, and that the domicil he selected was English, which he retained till he died.

The issue taken upon the Portuguese domicil must, therefore, be found in favour of the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Nelson & Son.*
Attorney for defendant: *J. S. Mercer.*

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Feb. 16.

CRISPIN *v.* CUMANO, Executor of DOGLIONI.

Sequestration—Money in the Funds—Dividends—20 & 21 *Vict. c.* 77, *s.* 25—*Testamentary Suit—Costs against the Defendant as Executor and as party—Defendant abroad.*

In a testamentary suit an order was made on the defendant, both as executor of the original defendant and as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, and the defendant being abroad, a writ of sequestration issued against his real and personal estate. A large amount of stock was standing in the books of the Bank of England to the credit of the defendant, as executor of the original defendant in the suit, and a dividend was due thereon:—

Held, that the Court of Probate had no authority to make an order upon the Bank of England (without their assent) to pay over such dividends to the sequestrators.

This was originally an interest suit between the plaintiff Francisco José Cortes Crispin, and Maria Doglioni, in which judgment was given on the 27th of May, 1863, in favour of the plaintiff, and on the 2nd of June the defendant Maria Doglioni was condemned in the costs. (1) An appeal was prosecuted in the House of Lords, pending which Maria Doglioni died, and Giustino Cumano, as her executor, became a party thereto. On the 31st of July, 1866, the decree appealed from was affirmed, and the appeal dismissed with costs. The costs in the original suit of *Crispin* v. *Doglioni* were taxed at 3605*l.* 19*s.* 2*d.*, and in the court of appeal at 1144*l.* 6*s.* 6*d.*, but deducting 400*l.* recognizance, they amounted to 744*l.* 6*s.* 6*d.* On the 19th of February, 1867, the order of the House of Lords was made an order of the Court of Probate. On the 22nd of December, 1868, the defendant not being resident in England, a sequestration issued from the Court of Probate against his real and personal estate, to enforce the payment of the taxed costs. It was directed to Charles John Mander, Thomas Dod Keighley, Frederick William Remnant, and John Hunter, and empowered them to enter upon all the messuages, lands, tenements, and real estate whatsoever, of the said Giustino Cumano, and to take, receive, and sequester into their hands not only all the rents and profits of his said messuages, lands, and tenements, and real estate, but all his moneys, securities for money, goods, chattels, and personal estate. At the time of the death of Maria

(1) 3 Sw. & Tr. 96.

Doglioni there was standing to her credit (and is now to the credit of the defendant as her executor) in the books of the Bank of England a sum of 99,424*l.* New Three per Cent. Bank Annuities, a sum of 75,442*l.* 11*s.* 3*d.* Three per Cent. Consolidated Bank Annuities, and a further sum of 5616*l.* 19*s.* 7*d.* Three per Cent. Reduced Annuities. By her will she gave the residue of her estate in six equal parts to certain persons, of whom Giustino Cumano, the defendant, is one. On the 4th of January, 1869, a notice on behalf of the sequestrators was served on Messrs. Freshfield, the solicitors for the Bank of England, to pay over to them the dividends on all sums of annuities which then were, or which at any time thereafter might be standing in their books in the name of the defendant Giustino Cumano, and generally all dividends, sums of money, property, or securities for money of the defendant then in their hands, or which had been received by them for the defendant, and also all further dividends; and the notice further required them not to part with or dispose of any such dividends, &c., to or to the order of the defendant, or any other person. In 1859 the plaintiff instituted a suit in the Court of Chancery against Maria Doglioni and the defendant, and an injunction, issued by consent, from that Court, which is still in force, to restrain the transfer by the defendant Giustino Cumano, of the sums standing in his name in the books of the Bank of England, but not to restrain the payment of the dividends, which the defendant, through his agents, has since received. Lastly, on the 8th of January, 1869, the defendant commenced an action in the Court of Common Pleas against the Bank of England, whereby he claimed payment from them of 1591*l.* 7*s.* as a debt, and by the writ issued in the action he gave notice of his intention to claim a writ of injunction to restrain the Bank from paying such sum, and also any dividends hereafter to accrue due for or in respect of the said sum of 75,442*l.* 11*s.* 3*d.* Three per Cent. Consolidated Annuities, to any other person than to him Giustino Cumano.

Dr. Deane, Q.C. (*Mander* with him), moved the Court on behalf of the plaintiff, and the sequestrators to order the Governor and company of the Bank of England to pay into court within seven days to the credit of the cause the sum of 1103*l.* 6*s.* 11*d.*, being

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the amount of one half-year's dividend now in their hands due in respect of a sum of 75,442*l.* 11*s.* 3*d.* Three per Cent. Consols, standing in their books in the name of the defendant; and also to pay into Court from time to time until the sale next hereafter mentioned, or until further orders, all dividends hereafter to accrue due on such sum, and also on a sum of 99,424*l.* New Three per Cent. Annuities standing in the name of the defendant. And that the said sequestrators be at liberty to sell, subject to any interest the plaintiff may have therein, the beneficial interest of the defendant in the two last-mentioned sums, and in the future dividends thereof; and that after paying all proper expenses of the sale out of the proceeds thereof, the sequestrators may be at liberty to pay the balance of such proceeds into court to the credit of the cause, and that the defendant be ordered to pay the costs of all parties incident to the application.

The Court has authority under 20 & 21 Vict. c. 77, s. 25, to make the order: *Dent* v. *Dent*. (1) These costs are a debt recoverable against the executor of the original defendant if he were in this country. A large amount of stock which formed part of the estate of the original defendant now stands in the name of her executor, who has also, as residuary legatee, a beneficial interest therein. If the money were brought into the registry, those who have a higher claim than the sequestrators to the proceeds would have an opportunity to establish it. They referred to *Pratt* v. *Bull* (2), *Wilson* v. *Metcalfe* (3), *Knight* v. *Knight* (4), Daniel's Chancery Practice, p. 952 (4th ed).

Dr. Spinks, Q.C., and *Cecil Russell*, for the defendant. It is not in accordance with the practice of the Court of Chancery to make such an application on motion. The defendant is only a trustee of this fund. The property in it is at present unascertained; the plaintiff himself has instituted a suit in which he claims a portion under a partnership between his father and Maria Doglioni. The Court of Chancery has no authority under a sequestration to attach a chose in action without the consent of the person in whose hands it is, and will never do so if the fund is held in trust. This Court cannot restrain the defendant from proceeding with his action against the Bank of England to recover the dividends. They

(1) Law Rep. 1 P. & D. 366.
(2) 1 D. J. & S. 141; 4 Giff. 117.
(3) 1 Beav. 263.
(4) 25 L. J. (Ch.) 848.

7 Jur. N.S. 41, 339.

referred to *M'Carthy* v. *Goold* (1), *Johnson* v. *Chippindall* (2), and *Tatham* v. *Parker*. (3)

Watkin Williams, and *Kekewich*, for the Bank of England. The Governor and company of the Bank of England do not desire to question the jurisdiction of the Court of Probate to make the order, but they cannot assent to it. If they paid over the dividends under such an order they would have no defence in the suit brought against them by Cumano, because they have been warned that the fund belongs to him only as trustee. According to the arrangement made between the Bank and the Treasury, the former are bound to pay the dividends to the actual stockholder, and to take his receipt, and that receipt only is their discharge for the money paid to him.

Cur. adv. vult.

Feb. 16. SIR J. P. WILDE. The statute 20 & 21 Vict. c. 77, s. 25, provides that the Court shall have the like powers, jurisdiction, and authority for enforcing all orders, decrees, and judgments made and given by the Court as are by law vested in the High Court of Chancery. On the 2nd of June, 1863, this Court made a decree condemning Maria Doglioni, the unsuccessful defendant in a testamentary suit, in the costs of the plaintiff. For the enforcement of this decree the Court, on the 29th of January, 1867, made an order upon Giustino Cumano, who was the executor of Maria Doglioni, and who had become a party to the suit in her place, for the payment of the amount of costs as taxed. The defendant Cumano is out of the jurisdiction, and the order cannot be enforced by attachment. There is, however, a very large amount of stock standing in his name in the books of the Bank of England, upon which the last accruing dividends are now in the hands of the Bank. It appears on affidavit that this stock is in fact held by Cumano, as executor of Maria Doglioni, the original defendant in the suit. It seems, therefore, extremely just and reasonable that the dividends above mentioned should be made available in satisfaction of the costs in this suit. Now, if the order in question had been made by a court of equity instead of the Court of Probate, the provisions of the 1 & 2 Vict. c. 110 would undoubtedly have been applicable to it; the order would have had the force of a

(1) 1 Ball. & B. 387. (2) 2 Sim. 55. (3) 1 Sm. & Giff. at p. 513.

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judgment at common law, and the funds in question would have been made available in satisfaction of the decree. And this, not by reason of the original authority of the courts of equity, but of the additional powers and authority indirectly conferred upon those courts for the enforcing of their orders by the Statute of Victoria. No doubt this statute did not prescribe any additional or new action on the part of the courts of equity themselves: all that they had to do after the passing of the statute was what they had done before. But it can hardly be denied that by reason of the new legal incidents and effects conferred on the orders of the courts by the statute, the power and authority of the courts for the enforcement of their orders was greatly and beneficially widened and extended. It is immaterial to this end whether a court is empowered to make orders of a more extensive character than heretofore, or whether a more extensive character and operation is by the act of the law given to the orders already in use. The wider and more searching the legal effect and practical scope of any order made to enforce a decree upon the person or property of him against whom it is issued, the greater the power and authority for the enforcement of that decree possessed by the court that issues it. I should have thought, therefore, that when the legislature declared its intention that the Court of Probate should have the like powers and authority as the courts of equity for the enforcing of its decrees and orders, it designed to include therein the power of making orders which should be of the like efficacy, attended with the same incidents, and followed by the same legal results, as those of the courts whose powers and authority formed the standard to which it was to be assimilated. And this design I should have thought might have been well conveyed in the general language employed in s. 25 of the statute, notwithstanding that by a very close adherence to the precise terms employed it was quite possible to infer a distinction between the power of the Court in making an order and the legal consequences of the order when made. These views, however, must now be taken as incorrect, for the matter has already received judicial consideration and opinion in the Court of Chancery. The case of *Pratt* v. *Bull* (1) is a direct authority, as it seems to me, upon the point; and the

(1) 1 D. J. & S. 141; 4 Giff. 117.

opinion of the very eminent judge by whom that case was determined must be held decisive. There is, therefore, no other way in which the order here in question can be enforced, except by a writ of fieri facias, or a writ of sequestration. A writ of fieri facias is inapplicable, and a writ of sequestration has issued. The sequestrators now apply, by motion, for an order upon the Bank of England to pay into Court the dividends in their hands. This order is opposed by Cumano. The Bank of England appeared by their counsel at the hearing of the motion, and neither assented nor objected to such an order being made. In these circumstances the question is whether the Court has power to make the order. It will not be right, even in furtherance of justice, to assume a power which the Court does not possess. And the limits of the powers which it does possess must be found in the powers hitherto exercised by the courts of equity in this direction. The only semblance of a direct authority produced in favour of the proposed order is the case of *Wilson* v. *Metcalfe.* (1) But in that case the third person upon whom the order was asked to be made was a consenting party to it. The question therefore arises whether an adverse order has ever hitherto been made in a court of equity on a third person, to pay over to a creditor money which he owes to the debtor. I cannot find that it has, and I must therefore, with much reluctance, refuse to make such an order. It is hardly within the province of this Court to suggest the remedy, if any there be, which the applicant has for the inefficiency of this Court to work out his rights. It may be that the courts of equity may be able to assist him in the suit now depending in reference to the stock in question, or it may be that the Bank of England, by bill of interpleader, may be able and willing to give some jurisdiction to the courts of equity under which justice may be done. It is enough for this Court to say, that as the case now stands on the decided cases, it can give the parties no further help towards obtaining the money to which they are justly entitled. The Court makes no order as to costs.

Attorney for plaintiff: *C. J. Mander.*
Proctors for defendant: *Dyke & Stokes.*
Attorneys for the Bank of England: *Freshfields.*

(1) 1 Beav. 263.

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Feb. 16.

IN THE GOODS OF BAILY.

Revocation of Appointment of Executors—Two Wills—"Sole" Executors.

A testator executed a will in 1856, whereof he appointed W. H. B. and P. B. executors. He executed another will in 1860, referring to and confirming the previous will, whereof he appointed W. H. B. and M. J. B. "sole" executors. Probate was granted of both papers as together containing the last will of the deceased, to W. H. B. and M. J. B. (excluding P. B.), the Court being of opinion that the use of the word "sole" in the will of 1860, indicated an intention to revoke the appointment of executors contained in the earlier will.

JOHN BAILY, of Bristol, commercial traveller, died on the 31st of July, 1868, at Bristol, leaving the following testamentary papers:—1. A duly executed will, dated the 3rd of January, 1856, whereby he bequeathed several specific legacies, and made a disposition of the residue, and appointed his son William Hellier Baily, and his daughter Priscilla Baily, executors. 2. A duly executed codicil to this will, dated the 24th of January, 1856, bequeathing several specific legacies, and repeating the appointment of his son and his daughter as executors. 3. A duly executed will, dated the 7th of August, 1860, bequeathing some specific legacies, and continuing in the following words:—"And I do hereby appoint my son William Hellier Baily, of Dublin, Ireland, and Mary Jane Baily, of Bristol, my sole executors and administrators to this my last will and testament." The will contained no clause of revocation.

The will of the 3rd of January, 1856, and the codicil of the 24th of January, 1856, were delivered into the custody of William Hellier Baily, sealed up, shortly after the date of their execution, and they remained in his custody and sealed up until the death of the testator.

Searle moved for a grant of probate of the will of the 3rd of January, 1856, and the codicil of the 24th of January, 1856, and the will of the 7th of August, 1860, as together containing the last will and testament of the deceased to William Hellier Baily, and Priscilla Baily, and Mary Jane Baily, the executors named therein.

SIR J. P. WILDE. No doubt the three papers are entitled to

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probate as together containing the will of the deceased, but there is a doubt as to the executors to whom the grant should be made. *In the Goods of Lowe* (1), it was held that the appointment of a "sole executrix" in a codicil operated as a revocation of the appointment of executors in the will.

Searle. The question in every case is one of intention, and the intention as far as it can be gathered from the terms of the will, was that the appointment of executors in the earlier will should be confirmed and not revoked: *In the Goods of Leese* (2), and *In the Goods of Morgan.* (3)

SIR J. P. WILDE. The cases seem rather inconsistent, but I shall follow *In the Goods of Lowe* (1), and hold that the use of the word "sole" in the last will, indicates an intention to revoke the appointment of executors in the previous will.

Probate of the three papers was accordingly granted to W. H. Baily, and M. J. Baily, the executors named in the will of the 7th of August, 1860.

Solicitors: *Torr, Janeway, & Taggart.*

ROSS *v.* ROSS.

Feb. 16.

Judicial Separation—Wife Petitioner—Adultery—Order to attend at hearing—Practice.

The Court has power under 20 & 21 Vict. c. 85, s. 43, to order a petitioner in a suit for judicial separation, by reason of adultery, to attend at the hearing of the petition.

CATHERINE ROSS, of Morley, near Leeds, Yorkshire, petitioned the Court to decree a judicial separation between herself and her husband, James Ross, by reason of his adultery. The respondent appeared and pleaded that the petitioner connived at the adultery alleged in the petition. On the 3rd of November, 1868, the Court ordered that the cause should be heard before itself without a jury. An affidavit having been filed by the attorney employed at York

(1) 3 Sw. & Tr. 478. (2) 2 Sw. & Tr. 442.
(3) Law Rep. 1 P. & D. 323.

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for the respondent, that it was material and necessary to the respondent's case that the petitioner should attend the hearing, and that if she were examined thereat she would be able to prove the connivance alleged,

Dr. Deane, Q.C., moved the Court to order the petitioner to attend the hearing of this cause in order to be examined.

Pritchard, for the petitioner, opposed the motion, and argued that 20 & 21 Vict. c. 85, s. 43, applied only to suits for dissolution of marriage.

The Judge Ordinary. The 43rd section authorizes the Court to order the attendance of a petitioner on the hearing of *any* petition. I shall make the order for the attendance of the petitioner in this case, but it does not follow that I shall permit her to be examined when the cause comes on.

Attorneys for petitioner: *Gregory, Rowcliffe, & Co.*
Attorneys for respondent: *Edwards, Layton, & Jaques.*

P. & D.

In the Goods of JOHN SACKETT SWINFORD.

Testamentary Paper—Execution—Signature not made or acknowledged in the presence of Witnesses.

On the death of the deceased a testamentary paper was found in his handwriting and with his signature at the foot or end. It had also an attestation clause and the names of two witnesses thereto. At the time of execution the deceased did not refer to the paper as a will, nor was there any evidence that the deceased's signature was on the paper at that time. The Court refused, on motion, to grant probate of such paper as a codicil to the will of the deceased.

John Sackett Swinford, late of Nash Court, near Margate, Kent, gentleman, died on the 3rd of October, 1868, having executed a will, bearing date the 9th of October, 1846, in which James Smith Swinford, and Daniel Swinford, were named executors. On the back of the will the deceased wrote as follows:—"Memorandum added April 25th, 1863. Having been left residuary legatee to Miss Mary Sackett's property, I wish all and everything that may come to my share to be applied for the use and benefit of my

first-named esteemed friend, Emma Malpas, plate, pictures, china, and furniture, &c., &c. "John Sackett Swinford.

"Witness the signature of the said John Sackett Swinford, in the presence of us, who at his request, and in the presence of each other, have hereunto subscribed our names, this *thirty-first* August, *eighteen hundred and sixty-three.*

William Mascall.
Jane Kennett."

The words in italics were written in a different coloured ink from the others. The witnesses to the execution deposed to the following effect:—

William Mascall:—"I recollect some five or six years ago calling upon the testator, with whom I was on friendly terms, at his house, when he said to me, 'You are just the man I wanted. I want you just to put your name to this paper,' at the same time producing the paper writing hereto annexed. He did not either before or after I had signed my name tell me what it was, so far as I recollect. He then called for his servant, Jane Kennett, and she almost immediately came into the room where we were. I then wrote my name, and she then wrote her's in my presence, but I am not certain whether I had not written my name before the said Jane Kennett came into the room, but my impression is that I signed my name in her presence. I am unable to say whether the said testator wrote his name in my presence or not. I think after I wrote my name he wrote something, but what it was I do not know, nor could I positively swear whether he did write anything. I cannot say whether I saw his name when I wrote mine, nor did he in any way refer to his signature. To the best of my recollection and belief he said nothing to me about what I was signing." He afterwards in a further affidavit added:—"I am unable to say whether the testator's signature was written to the codicil at the time that I attested it, or whether the paper writing was turned or folded down, so that I could not see the said testator's signature; and I say that at the time of my signing my name to the codicil, there was no one else in the room besides the testator and Jane Kennett."

Jane Kennett deposed as follows:—"The said testator, some five or six years ago, called me into his dining room at his

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residence at Nash Court, and producing a paper said, 'Jane, my girl, I want you to put your name to this paper.' There was some gentleman in the dining room at the time, but who it was I am unable to recollect. The said testator stood at the table and put the paper before me, and gave me a pen, and I wrote my name. I did not see him write his name to the best of my recollection, nor did he acknowledge or in any way refer to his signature. I did not see the other gentleman write his name. I put my name to the paper, and then directly left the room. The testator did not tell me what the paper was that I was signing, nor did I ask. I was not in the room more than a minute or two, only whilst I signed my name." Subsequently she deposed:—"I am unable to say whether the testator's signature was written to the codicil at the time that I attested it, nor am I able to say whether the paper writing was turned or folded down, so that I could not see the testator's signature. I say that at the time I entered the testator's dining room and until I left, there was no one else in the room, but the testator and the gentleman referred to in my former affidavit."

Dr. Tristram moved the Court to grant probate of the will and codicil. As regards the due execution of the latter, he relied upon the cases of *Gwillim* v. *Gwillim* (1), and *Vinnicombe* v. *Butler and Another.* (2)

SIR J. P. WILDE. I may call your attention to the fact that the words of the date in the attestation clause are in a different coloured ink from the others, so that possibly those were the words written by the deceased after Mascall had signed his name. In all the cases that have been decided, either the testator has signed his name in the presence of the witnesses, or his signature has been or might have been seen by the witnesses, or he has informed them that the paper they were about to sign was his will. In this case there is no evidence that the testator's name was on the will when the witnesses signed it, nor was anything said about a will at all. I must reject the motion, but the parties may propound the paper if they think proper.

Attorneys: *Kingsford & Dorman.*

(1) 3 Sw. & Tr. 200. (2) 3 Sw. & Tr. 580.

IN THE GOODS OF EMMA KEAL WESTON.

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Will destroyed with an intention to revive Will of earlier date—Evidence—Declaration after Destruction of Will.

A testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she destroyed the will with the intention that a former will should take effect.

The Court on motion refused, under the circumstances, to grant probate of a draft of the destroyed will.

EMMA KEAL WESTON, of Southampton, widow, died on the 22nd of April, 1868. On the 2nd of August, 1863, she duly executed a will, by which she left all her property to trustees, Arthur Henry Weston and John Carter, the younger, for the use of her daughter Louisa Anne Weston absolutely, and appointed the trustees executors. On the 24th of March, 1866, she duly executed another will, by which she gave the whole of her property to her daughter absolutely, and appointed her daughter and John James Carter executors. The daughter was the only next of kin of the deceased, and the only person entitled to her property in case of an intestacy. Miss Weston deposed that after the date of the last-mentioned will, her mother frequently declared her intention of destroying such will, in order, as she stated, that her former will, dated the 2nd of August, 1863, might stand and take effect as her last will. That one day in February, 1868, on the deponent returning home to her mother after a tempory absence, she found her mother alone, and saw the will of the 24th of March, 1866, lying torn to pieces in the fireplace. The deceased then told deponent that she had torn up and destroyed that will, with the intention that the former will might take effect. Such former will was then in possession of the deceased.

Dr. Middleton moved for probate of the draft of the will dated the 24th of March, 1866, such draft having been compared with and completed from the will itself after execution. He referred to *Powell* v. *Powell.* (1)

SIR J. P. WILDE. In the case of *Powell* v. *Powell* (1) there was distinct and undoubted evidence that at the very moment the

(1) Law Rep. 1 P. & D. 209.

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deceased destroyed his last will, he stated he did so in order that the earlier will should prevail. In this case the supposed declarations were not made at the time the deceased destroyed the will. They were far more vague, and not wholly reliable. I reject the motion; the daughter may propound the draft if she thinks proper.

Proctors: *Rothery & Co.*

Feb. 23.

IN THE GOODS OF ANDREW RUSSELL.

Renunciation by Executor—Will—Attorney for other Executors—Rule 50 (*Rules and Orders*, 1862).

The Court allowed one who had been appointed an executor, and had renounced that office, to take administration with the will annexed as attorney of the other executors, notwithstanding Rule 50 (Rules and Orders, 1862).

ANDREW RUSSELL, late of Melbourne, Victoria, died on the 10th of December, 1867, at Boulogne-sur-Mer in France, having executed a will, dated the 11th of September, 1854, in which he had appointed as executors, Peter Inglis, William Taylor, and Archibald Fiskin. He also executed two codicils, bearing date respectively the 13th of March, 1858, and the 24th of July, 1861. In the last codicil was the following clause:—"In the event of my decease whilst in Europe, or elsewhere, it is my will and desire that the following gentlemen be requested to act in conjunction with the executors already named, viz., Donald Larnach, esquire, London Bank of New South Wales, and David Moore, esquire, late of Melbourne. In November, 1868, Donald Larnach, Peter Inglis, and David Moore executed documents, whereby they severally renounced all right to probate of the will and codicils of the deceased, and their renunciations having been filed in the proper court in Victoria, on the 19th of November, 1868, the supreme court of that colony granted such probate to William Taylor and Archibald Fiskin, the two other executors named in the will of deceased. On the 3rd of December, 1868, the said Messrs. Taylor and Fiskin executed a power of attorney by which they empowered Donald Larnach, one of the renouncing executors, to apply for letters of administration, with the will and codicils of the deceased annexed, in this country for their use and benefit.

Mr. Larnach objected to act as executor because the deceased's estate was principally in Australia, and he was resident in London; he was however quite willing to act as attorney for the acting executors in this country. The property of the deceased in this country was of the value of 4800*l.*

C. A. Middleton moved the Court to decree administration to Mr. Larnach accordingly. The 50th rule, which directs that no person who renounces probate of a will of a deceased in one character is to be allowed to take a representation to the same deceased in another character, does not apply in this case. The two *characters* therein referred to must be derived directly from the deceased, the right by which Mr. Larnach claims administration has been acquired quite independently of the deceased.

SIR J. P. WILDE. I think it will be proper that Mr. Larnach should execute a renunciation of the executorship in this country; when the renunciation has been filed, administration with the will and codicils may go to him as the attorney of the foreign executors. I see no objection to a man who has been appointed an executor by a testator saying that he will have nothing to do with the property as executor, and that he will withdraw from that position, and afterwards saying that he is willing to act in the capacity of attorney for some one else. There is no reason why the Court should not sanction such a state of things, or why it should decide that such a man, having given up his own claim and rights as an executor, is precluded from acting as the agent of a third person. As regards the application of the 50th rule to this case, I think that the words "No person who has renounced in one character shall take a representation to the same deceased in another character," must mean that where a man under a will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground. He cannot throw aside probate and take a more limited grant. That rule does not conflict with the decision the Court has now arrived at. The grant may go.

Attorneys: *Waltons, Bubb & Walton.*

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IN THE GOODS OF JOHN HOWARD.

Revocation—Will—Codicil.

A testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will :—

Held, that the will was not revoked.

JOHN HOWARD, of the township of Staley, Cheshire, cotton-spinner, by his will, dated the 5th of February, 1859, gave and devised all his property to Samuel Cocker and William Sunderland, upon certain trusts for his three children, Harry Edward Howard, Sarah Margaret Howard, spinster, and Percy Samuel Howard, in equal shares. The testator in the will appointed Samuel Cocker and William Sunderland executors of his will and guardians of his infant children. By a codicil, dated the 19th of November, 1863, the testator revoked all the provisions in his will in favour of his son Harry Edward Howard, and declared other trusts in respect of the property comprised in the share of such son; in all other respects he confirmed his will. On the 23rd of July, 1868, the testator executed a second codicil to the following effect:—"This is a second codicil to the last will and testament of me, John Howard, of, &c., which will bears date the 5th of February, 1859. I absolutely revoke and make void all bequests and dispositions in my said will, and I bequeath all my property to my housekeeper, Margaret Wright, late of Chelmorton, Derbyshire, and I appoint Mr. Henry Heap, of Staleybridge, auctioneer, one of my executors; Mr. Robert Heap, auctioneer, the son of the said Mr. Henry Heap, another of my executors, and Margaret Wright, the aforesaid, my executrix."

Bayford moved for probate of the will and two codicils to be granted to Mr. Robert Heap and Margaret Wright, as two of the executors named therein. Although the codicil revokes all the bequests and dispositions in the will, it does not revoke the appointment of executors or guardians named therein; the will, therefore, must be admitted to probate.

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SIR J. P. WILDE. The testator calls this paper a codicil to his will, and the legal operation of a codicil is to confirm such parts of the will to which it refers as it does not revoke. I decree probate of all three papers.

Proctor: *Ayrton.*

IN THE GOODS OF J. RISDON.

March 23.

Administration granted to a Female Creditor—Subsequent Marriage of Administratrix—Debt not Reduced into Possession—Right of Husband to Administration de bonis non.

A female having taken administration to the estate of the deceased as a creditor, married and died. Under the administration she got in a considerable portion of the estate of the deceased and paid some of the debts, but did not set apart any particular fund in payment of her own debt:—

Held, that the husband was not entitled in his own right as a creditor, but only as the representative of his wife, to take administration of the unadministered effects of the deceased.

JOHN RISDON died on the 15th of March, 1865, without any known relation, and intestate. On the 23rd of May, 1866, administration of his effects was granted to Mary Hooper, as a creditor to the amount of 300*l.*, for work and labour done by her for deceased, and for money lent and advanced and paid by her to and for him. The estate and effects of the deceased consisted of some horses and carriages, and two leasehold houses in mortgage, under the value of 450*l.* The administratrix sold the horses and carriages for 39*l.* 10*s.*, and obtained a further advance on mortgage of the leaseholds to the amount of 160*l.* Out of this she expended 175*l.* 13*s.* 5*d.* for the purposes of the administration, and there remained debts due from the estate to the amount of 276*l.* 1*s.* 5*d.*, exclusive of the sum on mortgage, and of the debt due to the administratrix. On the 26th of July, 1868, she married Edward Hibberd, who thereupon entered into possession of the leasehold houses and the rents and profits thereof. He paid the ground rent and certain monthly instalments of the mortgages. On the 6th of September, 1868, Mrs. Hibberd died, without having sold the leasehold houses or fully administered the estate, and the debt of 300*l.* still remained due to Mrs. Hibberd

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and Edward Hibberd in her right. The Queen's Proctor declined to take administration.

Bayford moved that administration of the administered goods of the deceased should be granted to Mr. Hibberd, as a creditor of the estate of the deceased.

[SIR J. P. WILDE. This was a chose in action belonging to the wife. What has the husband done to reduce it into possession? Although the fund has been enlarged out of which the debt may be paid, it has not thereby been reduced into possession.]

By taking administration as a creditor, proceedings were commenced to obtain the debt.

[SIR J. P. WILDE. All that has been done is to administer. The estate has been got in, and there they have stopped. It is quite consistent with this, that they did not intend to claim the debt at all.]

SIR J. P. WILDE. John Risdon died in the year 1865. After his death letters of administration of his estate were granted to Mary Hooper as a creditor. She got in a considerable portion of the estate, and paid some of the debts. She then married the present applicant, and within six weeks died. Her husband now applies for a grant of administration of the unadministered goods of the deceased as a creditor. It is obvious that no debt is due to him, unless it passed to him jure mariti, and he reduced it into possession. That cannot be maintained in this case. What he really did was to take possession of that part of the estate of the deceased which was in his wife's possession under the administration at the time he married her, and retain it, but that is not sufficient to reduce into possession a debt, a chose in action, belonging to his wife. Something ought to have been done to satisfy the claim, but here no part of the estate was set apart for the payment of the debt. Moreover, it is inconsistent with the position that the debt has been reduced into possession, that the applicant is now asking for administration as a creditor, for that implies that the debt is still due. He cannot take the grant as asked; he must take it through his wife.

Attorney: *S. N. Cooper.*

B. *v.* L. (FALSELY CALLED B.)

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March 2.

Nullity of Marriage—Order for Inspection of Person—Refusal to Submit—Attachment.

In a suit of nullity, by reason of the malformation of the woman, the Court made the usual order for the inspection of her person. This order was personally served upon her, but she refused to submit to such inspection. The Court directed that a motion for an attachment against her should stand over until after the hearing of the petition.

ON the 7th of April, 1868, the petitioner presented a petition to this court, praying that a marriage celebrated between him and the respondent should be declared null and void by reason of the incurable malformation of her parts of generation. The petition and citation were personally served upon her, but she did not enter an appearance thereto. On the 16th of June, 1868, the Judge Ordinary made the usual order appointing Dr. Arthur Farre and Mr. Christopher Heath inspectors to examine the respondent and to report whether she is or not a virgin, or hath or hath not any impediment on her part to prevent the consummation of marriage; and further, that the respondent and the inspectors should attend before one of the registrars of the Court at such time and place as he may appoint, in order that the said respondent may be identified as the party in the cause, and the inspectors be duly sworn. This order was personally served upon the respondent on the 4th of September, 1868, and the attorney who served it explained to her its purport, and warned her it was her duty to submit to it. On the 11th of September, through her attorney, she formally declined to submit to any examination of her person. On the 1st of February, 1869, another copy of the order was personally served upon her, and she was informed that if it was not obeyed an application would be made for an attachment against her; but on that occasion and subsequently, through her attorney, she absolutely refused to comply with it.

Dr. Spinks, Q.C., moved the Court to order an attachment to issue against the respondent. The petitioner was quite willing that it should lie in the registry until after the hearing of the cause, provided the respondent did not attempt to leave the

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country. Possibly the evidence will be sufficient to satisfy the Court without a personal inspection of the respondent; if so, there will be no necessity to enforce the attachment.

THE JUDGE ORDINARY. I think the course suggested, under the circumstances, is very desirable, but with some modification. I do not consider that I ought to make an order for an attachment which shall lie in the office. The question at the hearing will be, whether I ought or ought not to persist in ordering an examination of the person of the respondent, and if I determine that I ought, I must make a fresh order naming time and place for the purpose, and not proceed by way of attachment. The motion for an attachment may stand over, but if the respondent attempts to leave the jurisdiction it shall be granted at once.

Attorney: *T. H. Dixon.*

March 16.

C. *v.* C.

Dissolution of Marriage—Hearing in camerâ—Practice.

62 3 P. & M. 230
C. L. D. 174

Under the 22nd section of 20 & 21 Vict. c. 85, the Court may hear a suit in camerâ, if it be brought for nullity of marriage, or judicial separation, but there is no authority given to the Court by the statute to hear a petition for dissolution of marriage except in open court.

THIS was a petition by the wife praying for a dissolution of her marriage, by reason that the respondent had been guilty of sodomy with two young men in his service.

Dr. Tristram moved that the cause might be heard before the Court itself without a jury.

Searle, for the respondent, asked that it might be heard in camerâ.

Dr. Tristram, for the petitioner, consented to that application.

Cur. adv. vult.

March 16. THE JUDGE ORDINARY. I have considered the matter, and I think I have no power to hear the cause in camerâ

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C.
v.
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The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the ecclesiastical courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85. There is, however, nothing at all in that statute which gives such a power to the Court in suits for dissolution of marriage, and in one of the amendment acts a clause which had been introduced for the purpose of giving such a power, was rejected by the legislature; I therefore think that I am bound to hear the case in open Court.

Attorney for petitioner: *J. Holmes.*
Attorneys for respondent: *Lewis & Watson.*

KEECH *v.* KEECH.

1868
Nov. 14.

Desertion.

A husband and wife were cohabiting in Jamaica, where the husband held an appointment, when the wife was obliged to come to England in consequence of ill health. The husband afterwards, in 1851, asked her to return, and provided funds for her passage, but her health was not sufficiently re-established to enable her to accept his offer. She had no further communication with him, but in 1856 he made her an allowance, which he continued to pay until 1860:—

Held, that as she had never made any offer to return to him after refusing his offer in 1851, he had not deserted her.

THIS was a petition by a wife for a dissolution of her marriage, which occurred in April, 1845, on the grounds of adultery, cruelty, and desertion. The respondent did not appear. The cause was heard on the 12th and 13th of November, by the Judge Ordinary without a jury.

Dr. Swabey, for the petitioner.

At the close of the petitioner's case, the Court intimated that it considered the charge of adultery was proved, and the charge of cruelty was not proved.

The facts relied on in support of the charge of desertion are set out in the judgment.

Cur. adv. vult.

1868

KEECH v. KEECH.

THE JUDGE ORDINARY. The question which the Court took time to consider in this case is, whether the petitioner has established the charge of desertion. Shortly after the marriage she went with her husband to Jamaica, where he had an appointment from which he derived not more than about 100*l.* a year, and in consequence of his slender income she, no doubt, had to put up with some hardships. Her health suffered, and at the end of 1845, or the beginning of 1846, she returned to England, and she has remained in England ever since. Mr. Keech, as far as we know, has remained abroad ever since, and during the greater part of the time in Jamaica, where he succeeded in obtaining a rather more lucrative appointment. Mrs. Keech's case is, that the circumstances under which they have been living separate amount to desertion on his part.

She states that when she left Jamaica in 1846 he put her on board the vessel himself and acted kindly to her, that there was then no arrangement for a separation, and he said he would allow her 30*l.* a year. Considering that his income was only 100*l.*, this would seem to be a very fair provision. She goes on to say that she lived with her mother after her return to England until 1851, and corresponded with her husband during that time on kindly terms. These facts, that a wife leaves her husband on account of her health, and takes up her abode with her mother, and keeps up a friendly correspondence with her husband, certainly cannot be said to constitute desertion. "In 1851," she says, "he wrote to me. I have torn up the letter. He said in it, 'You must come to me in Jamaica directly. The money for your passage is at my agents. If you do not come I shall disappear, and you will hear no more of me.'" It seemed likely to the Court from the tone of that letter that he had on some former occasion intimated a desire that she should rejoin him in Jamaica. The petitioner said he had not done so, and the Court has no other evidence before it on the point. But what was her answer to the letter? "I said I was in very bad health, and I could not come. I was still weak, suffering from neuralgia, and I asked him to allow me to apply the money which he had sent for my passage to my own use." He did not assent to this proposition, and the result was that she did not go out. There the correspondence ended, and she heard no more of

him until 1856. In that year, through the medium of some persons living in Jamaica, she succeeded in ascertaining, as she was desirous of doing, where he was, and she found that he was still in Jamaica, and that he was leading a loose life. One of her relations wrote to him on her behalf, and he thereupon made her an allowance of 50*l.* a year for her own use, besides paying 25*l.* a year to her mother in remuneration for her past support, and this allowance he continued to pay until October, 1860. He then wrote and told her that his circumstances were altered, and he was no longer able to pay it.

The Court is asked to come to the conclusion under these circumstances that the husband deserted the wife, that is, that he wilfully separated himself from her against her consent. The Court cannot come to such a conclusion upon the evidence. He made a definite offer to receive her in 1851, and provided funds to enable her to join him. If her health was not sufficiently re-established at the time to enable her to accept his offer, she ought to have been able to shew that, knowing his desire to have her back, she afterwards made some offer to go back. It seems to me that he was willing to have her back, but she was not willing to go, and in one of his letters, dated in 1860, he writes that "he has declined repeated offers of private practice, Mrs. Keech having refused to return to the island."

That Mr. Keech is now willing that his wife should obtain a divorce I believe, for in one of his letters he says: "If you want a letter for the Divorce Court, send me the draft of one and I will sign it;" but although both parties are desirous to have a decree of dissolution pronounced, the Court is not at liberty to pronounce it, there being no desertion. The adultery, however, is proved, and the petitioner is entitled to a decree of judicial separation on that ground.

Attorneys: *Bell & Newman.*

1869
May 4.

MORGAN *v.* MORGAN AND PORTER.

Dissolution of Marriage—Adultery of the Respondent and Petitioner proved—Discretion—20 & 21 Vict. c. 85, s. 31.

The discretion to be exercised under the 31st section of 20 & 21 Vict. c. 85, must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable or capable of excuse. There must be some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner.

IN this case William Morgan petitioned for a dissolution of his marriage with the respondent, Ellen Morgan, by reason of her adultery with Edward Porter. The adultery, as set out in the petition, was stated to have been committed in the months of August and September, 1866, and between that period and the 18th of January, 1868. The respondent, in her answer, denied the adultery, pleaded condonation, wilful neglect, and misconduct, which had conduced to the adultery, and cruelty. She also alleged that the petitioner had himself habitually committed adultery with Nancy Bentley during the years 1856, 1857, and 1858, at his place of business, and at his then private residence. The marriage between the petitioner and respondent was celebrated on the 13th of July, 1855. The issues were tried before the Judge Ordinary and a common jury on the 3rd and 4th of March instant, and they found that the respondent and co-respondent had committed adultery together; that the petitioner had not condoned such adultery, had not by wilful neglect and misconduct conduced to such adultery, and had not been guilty of cruelty towards the respondent. They further found that the petitioner had been guilty of adultery with Nancy Bentley.

Dr. Deane, Q.C., and *Inderwick*, for the petitioner, applied to the Court to exercise its discretion, and grant a decree nisi for the dissolution of the marriage of the parties, notwithstanding the verdict of the jury finding the adultery of the petitioner. If the adultery of the husband had only just preceded that of the wife, the petitioner would have no reason to complain if the Court

refused to make a decree; but the adultery proved against the husband took place ten or eleven years ago. The parties have continued to live together ever since, and it could not have led to the corruption of the wife. Under such circumstances it would be hard upon the petitioner if it were an absolute bar to a decree. If an act of adultery committed by the husband many years before the adultery of the wife were to be an absolute bar, it would almost amount to leave and license to the wife to misconduct herself to any extent. They referred to *Lautour* v. *Lautour* (1); *Clarke* v. *Clarke and Clarke* (2); and *Anichini* v. *Anichini*. (3)

THE JUDGE ORDINARY. The Court has only, up to the present time, recognized three classes of cases in which it would exercise the discretion given to it under the 31st section of the Divorce Act, 1857. There is first a class of cases, of which *Joseph* v. *Joseph and Wenzel* (4) is an instance in which the petitioner having instituted a suit against his wife for adultery, was led to believe she was dead, and acting on that belief married again. Again, there was the case of *Coleman* v. *Coleman* (5), in which the petitioner satisfied the Court that she had been compelled by her husband to lead a life of prostitution. Lastly, there are cases such as *Anichini* v. *Anichini* (3), in which an act of adultery of the husband has been condoned by the wife, and in no way conduces to her subsequent falling away. If we desert these principles, and in each instance consider whether the act of adultery proved against the petitioner is more or less pardonable, we shall get into great difficulties.

Dr. Spinks, Q.C., and *Searle*, for the respondent. If the Court grants this application, it will be acting directly against a whole series of cases. In *Goode* v. *Goode and Hamson* (6) the Court refused to make a decree, although the petitioner's adultery had been condoned. In this case the respondent had no knowledge of, and could not have condoned, her husband's adultery. They referred also to *Barnes* v. *Barnes and Beaumont*. (7)

Cur. adv. vult.

(1) 33 L. J. (P. M. & A.) 89.
(2) 34 L. J. (P. M. & A.) 94.
(3) 2 Curt. 210.
(4) 34 L. J. (P. M. & A.) 96.
(5) Ante, p. 81.
(6) 30 L. J. (P. M. & A.) 105.
(7) Ante, p. 572.

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May 4. THE JUDGE ORDINARY. The general question involved in this case is a serious one. It is practically this: to what extent ought this Court to exercise a discretion in granting or withholding a divorce to a petitioner, who has himself been found guilty of adultery. There is no doubt, I think, that the legislature has invested this Court with a discretion on the subject; and there is equally no doubt that there are cases in which the adultery of the petitioner has been committed under such circumstances that it ought not, in justice, to stand in the way of a decree. In one case, the respondent, who was living in adultery, had contrived to induce the petitioner to believe that she was dead. Upon receiving this information the petitioner married again. When he found out his mistake, he sued the respondent for her adultery, and she retorted the adultery of which he had been guilty with his second wife. The Court thought that ignorance was innocence, and granted him his decree. In another case the wife was the complainant. She proved a case for divorce against her husband, and he in return accused her of adultery, which was established. But it was further proved that he had by threats and violence forced her to lead an immoral life, from which he derived a pecuniary benefit. It was held that adultery so caused ought to be no bar to the wife's relief. It may also well be that an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent. This was much discussed by the ecclesiastical court in the case of *Anichini* v. *Anichini*, and it was pointed out that upon a contrary view a sort of licence to commit adultery without punishment would be set up on the one side, by guilt on the other, however distant in point of time, or however completely forgiven and condoned. There appears to me to be great force in the observations of the learned judge in that case, and on a proper occasion it will be very fit to consider whether his views ought not to be adopted in applying the discretion vested in this Court by the 31st section of 20 & 21 Vict. c. 85.

Here, then, are three classes of cases, and there may be, and probably are, others, in which the discretion may be fitly exercised in favour of a petitioner. But in cases where the adultery com-

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plained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any court, still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half-formed thought. Under cover of the word "discretion" a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials so used two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, and shakes public confidence in the justice of the tribunal.

I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court. Past experience has already pointed out some classes of cases to which it is fitly applied; and the future may probably furnish more. But the facts of this case present no definite features beyond more lapse of time to justify its exercise; and the Court must refuse a decree.

Attorney for petitioner: *H. B. Clarke.*
Attorney for respondent: *J. Fluker.*

1869
May 11.

WORSLEY *v.* WORSLEY AND WIGNALL.

Dissolution of Marriage—Deed of Separation—Post-nuptial Settlement—22 & 23 Vict. c. 61, s. 5.

All deeds, whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of 22 & 23 Vict. c. 61, s. 5, and the Court has power to deal with them.

THE petitioner, Charles Worsley, presented a petition for the dissolution of his marriage with the respondent, Harriet Elizabeth Worsley, by reason of her adultery with the co-respondent, Samuel Wignall. A decree nisi was pronounced on the 25th of February, 1868, and the decree was made absolute on the 17th of November, 1868. In December, 1868, Mr. Worsley petitioned the Court under 22 & 23 Vict. c. 61, s. 5, to vary a post-nuptial settlement or deed of separation bearing date the 4th day of December, 1865, in such manner as to the Court should seem meet. The deed of separation was executed by the petitioner and respondent, and by Mr. John Crews Dudley as trustee. It recited that differences had arisen and continued between the petitioner and respondent, and that they had agreed to live separate from each other, and by it Mr. Worsley covenanted to allow the respondent to live separate and apart from him, as if she were sole and unmarried, at such places and in such manner as to her shall from time to time seem meet, and that he will not directly or indirectly molest or disturb her in her person or in her manner of living, nor at any time endeavour by the institution of proceedings in any court or otherwise howsoever to compel her to cohabit with him or to enforce restitution of conjugal rights. He further covenanted to pay at the expiration of six calendar months to Mr. Dudley, his executors and administrators, for the use and benefit of the respondent, the sum of 50*l.* sterling, and yearly during the joint lives of the petitioner and respondent, for the sole and separate use and benefit of Mrs. Worsley, and without power of anticipation, a clear annuity or yearly sum of 200*l.*, and in case Mr. Worsley should pre-decease the respondent a clear annuity of 150*l.* during the remainder of her life or until she should marry again, and from and after her re-marriage during the remainder of her life a clear annuity of 50*l.*, the said annuities to be paid by equal monthly portions without

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deduction. He further covenanted that if his wife should die in his lifetime he would permit her last will and testament to be proved, or if she should die intestate as to all or any part of the estate and effects by the deed declared to be for her separate use or disposal he would permit administration of her estate to be taken out by the person who would have been entitled if the respondent had survived the petitioner, and allow the said estate to be distributed either under such probate or administration. He further covenanted that all the estate and effects, real and personal, which the respondent was then entitled to, or during the joint life of himself and respondent should descend or come or devolve upon her as next of kin to any person or persons or otherwise, or be given or devised or bequeathed or conveyed to or in trust for her or to, for, or upon him in her right, should be held, enjoyed, sold, given away, devised, bequeathed, and disposed of by the respondent, her heirs, administrators, and assigns, in such manner as she should think fit, without being subject to the debts, control, claim, or interference of Mr. Worsley, as if he were then dead, leaving the respondent him surviving. Lastly, he covenanted to take charge of their children. Mr. Dudley, as trustee, covenanted that the respondent, so long as Mr. Worsley observed the covenants made by him, should not at any time or in any manner molest, annoy, or visit her husband, or in any way compel or endeavour to compel him to cohabit with her, or to allow her any maintenance or alimony further or otherwise than as provided for by the deed. The deed also contained a provision that the husband and wife by any writing under their respective hands might revoke and determine such deed and the contents thereof. The petition having been referred to one of the registrars, he on the 9th of February, 1869, reported as follows:—In this case there was no marriage settlement, and the deed which the Court is asked to remodel is a deed of separation in which there is not the clause commonly called "dum casta." The point, therefore, is whether such a deed is a post-nuptial settlement within the meaning of the act. . . . By the deed the respondent is entitled to 200*l.* a year now, after the petitioner's death to 150*l.* a year, and 50*l.* a year only on her re-marriage. The petitioner seeks to reduce the first payment one third, the other two by one half.

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Dr. Tristram, on behalf of the petitioner, applied to the Court to vary the provisions of the deed of separation by reducing the annuities of the wife in the proportions suggested by the petitioner. As there is no clause in the deed of separation which provides for that which has happened, the unfaithfulness of the wife, the provisions of the deed can still be enforced. He referred to *Callwell* v. *Callwell and Kennedy* (1), and *Stone* v. *Stone and Brownrigg*. (2)

Dr. Deane, Q.C., and *Searle*, for the respondent, contended that the Court had no jurisdiction in this case under 22 & 23 Vict. c. 61, s. 5. This deed differs in several material points from a post-nuptial settlement. The latter has in view the parties living together; the first their separation. A post-nuptial settlement is made with reference to a marriage, and for the benefit of both parties; this deed is one of separation, and for the exclusive benefit of the wife. The appointment of trustees is for totally different purposes in the two cases, and one is revocable, the other not. If the legislature had intended that the Court should deal with deeds of separation, it would have distinctly said so.

Cur. adv. vult.

May 11. THE JUDGE ORDINARY. In this case the respondent has been found guilty of adultery. There remains a question for examination, namely, whether this Court can interfere, under the provisions of the 5th section of the statute 22 & 23 Vict. c. 61, with a certain deed entered into between the parties; whether, in fact, it can be considered a post-nuptial settlement. Has it the character intended by the legislature under the words post-nuptial settlement? The deed is an ordinary deed of separation. It provides that the husband and wife may live apart. The husband covenants that he will not interfere with his wife, and that he will pay to her 200*l.* per annum during their joint lives, and that on his decease she shall receive an annuity of 150*l.* during the remainder of her life, or if she marries again, an annuity of 50*l.*, and it contains the other usual arrangements. Such is a general description of this document, and the question is, is it a post-nuptial settlement? The legislature has made use of very general terms. "The Court may inquire into the existence of ante-nuptial and post-nuptial settlements made on the parties whose marriage is the subject of a

(1) 3 Sw. & Tr. 259. (2) 3 Sw. & Tr. 372; 33 L. J. (P. M. & A.) 95.

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WORSLEY v. WORSLEY.

decree, and may make orders with reference to the application of the whole or a portion of the property settled." The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife. If a wife commits adultery and the marriage is dissolved, she is no longer a wife, and the Court can, within the spirit of the statute, deal with the settlement. In this case the proposition made by the husband is a reasonable one, namely, to reduce the 200*l.* per annum by one third, and the other sums by one half, and I shall direct an order to be drawn up embodying that proposal, the order to be submitted to the parties after it is drawn up, so that they may make any objection to it they may be advised.

Attorneys for petitioner: *Dawes & Sons.*
Attorneys for respondent: *Huson & Parker.*

NOBLETT *v.* NOBLETT AND KERSHAW.

May 11.

Matrimonial Suit—Alimony pendente lite—Wife found Guilty of Adultery—Delay—Refusal.

The Court refused to make any order for alimony pendente lite, after a decree nisi had been obtained for a dissolution of marriage by reason of the wife's adultery, the wife having allowed some months to elapse after the commencement of the suit before she filed her petition for alimony.

ON the 29th of May, 1868, Robert Noblett filed a petition praying for a dissolution of his marriage with Sarah Mary Noblett, by reason of her adultery with the co-respondent. On the 11th of July, the respondent filed her answer, which traversed the alleged

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adultery and set out counter-charges against the petitioner. On the 21st of July, 1868, an order was made directing the manner in which the cause should be tried. In March, 1869, the respondent filed a petition for alimony, which the petitioner answered on the 13th of March. On the 20th of April, on the application of the respondent, the petitioner was ordered to give a further and fuller answer to her petition for alimony; and such fuller and further answer was filed on the 5th of May. On the 7th of May, the original petition was heard before the Judge Ordinary and a common jury, and the respondent was proved to have been guilty of the adultery alleged, and a decree nisi was made.

Searle moved for an allotment of alimony on the answers of the husband. The respondent ought not to be deprived of her alimony because her husband did not, in the first instance, give in proper answers to her petition.

Dr. Spinks, Q.C., for the husband, objected to the Court making any order for alimony, now the wife had been found to have been guilty of adultery. If she has lost her chance of obtaining alimony, the blame is on herself, as she should have presented her petition at an earlier stage of the proceedings.

THE JUDGE ORDINARY. I shall make no order as to alimony in this case. The basis of such an application is, that the wife is without means. If the respondent was in such a state, why did she not apply earlier? The original petition was filed in May, 1868; the petition for alimony, in March, 1869; and even after that the respondent did not push forward her claim, for she waited a whole month before she asked for a further answer to the petition for alimony. The result is, that she has not been in a position to ask the Court to award her alimony until after she has been found guilty of adultery, and she is now too late.

Attorneys for petitioner: *Rickards & Walker.*
Attorneys for respondent: *Cowdell & Grundy.*

1869
April 27.

IN THE GOODS OF G. CASMORE.

Will—Execution—Signature in Attestation Clause—Second Signature beneath Names of Witnesses.

The testator having informed the witnesses that he wished to make his will filled up a printed form in their presence, and wrote his name in the attestation clause thereto. After the witnesses had signed their names, the testator again wrote his name beneath their signatures.

The Court granted probate of the will, with the omission of the testator's second signature.

GEORGE CASMORE, on the 16th of April, 1864, made a will by which he left all his property to his wife Mary Ann Casmore. The will, which was written on a printed form, concluded as follows:—

Signed and declared by the said George Casmore, the testator, as and for his last will and testament, in the presence of ——, who at his request, and in the presence of each other, all being present at the same time, have hereunto subscribed our names as witnesses.	James Bradnam, Jun., 5, Bray's Buildings, Lower Road, Islington. Jesse Wright, 25, Yardley Street, Clerkenwell. George Casmore, 2, Yardley Street, Clerkenwell.

Messrs. Bradnam and Wright, in their affidavit, stated that on the evening of the 16th of April, 1864, they were both at the house of Mr. Casmore, when he told them that he wished to make his will and to secure his property to his wife, and that he had got a printed form of a will which would suit, and he asked them to be the witnesses of his signature. That they said they would, and Mr. Casmore then, in their presence, filled up the printed form of the will and wrote his name in the attestation clause thereto, as the same now appears thereon in the presence of both of them, both present at the same time, and that the testator having expressed a wish that they should subscribe and attest the will, they did so in his presence, and after they had done so, the testator signed his name underneath, remarking that we were the witnesses of his will. They further stated that they believed Mr. Casmore

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was aware of the legal requirements necessary to make the execution of a will valid; and that from the fact that he requested them to sign their names immediately after he had written his name in the attestation clause, they believed the testator intended his signature in the attestation clause to be the signature of his will, and that he afterwards signed the will underneath their names for greater security.

Dr. Spinks, Q.C., moved for probate of this will. He relied upon the case *In the Goods of J. Walker.* (1)

LORD PENZANCE. The case cited is in point. Substantially it is the same as this. Probate will be granted, for I think the deceased intended by signing his name in the attestation clause to execute his will. The probate, however, will issue without the signature of the deceased written under the names of the witnesses.

Attorneys: *Lewis & Sons.*

April 27.

GRANT AND GRANT *v.* GRANT.

Will—Appointment of Executor—Petition—Receiver of Real Estate—20 & 21 Vict. c. 77, s. 71—Practice.

The Court has no jurisdiction to appoint a receiver of the real estate of a deceased when the only litigation is by petition in reference to the individual appointed executor, and there is no suit pending touching the validity of the will.

JOHN GRANT, of Rugby, Warwickshire, a dealer in marine stores, died on the 22nd of February, 1868, having executed a will dated the 18th of February, 1868, and a codicil dated the 21st of February, 1868. In the will were the following clauses: "I bequeath to my nephew Joseph Grant the sum of 500*l.*, and all the stock and household effects in the house where I now live; and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live. . . . I appoint my said nephew Joseph Grant executor of this my will." One of the plaintiffs, Joseph Grant, was the nephew of the deceased's wife, and had been brought up and educated by the deceased, and had latterly,

(1) 2 Sw. & Tr. 354.

and up to the time of the deceased's death, managed the business. The defendant Joseph Grant was a son of a brother of the deceased. A petition, answer, and replication had been filed, in which the parties respectively claimed to be the executor named in the will, but the validity of the will was in no way questioned by either of them.

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Dr. Swabey, on behalf of the defendant, moved the Court on affidavits to appoint an administrator pendente lite, and a receiver of the real estate.

LORD PENZANCE called attention to the 71st section of the Probate Act (20 & 21 Vict. c. 77), which confines the authority to appoint a receiver of the real estate to cases in which a suit is pending touching the validity of any will of the deceased person by which his real estate is affected. As there is no such suit pending in this case he had no authority to appoint a receiver.

Proctors for plaintiffs: *Shephard & Skipwith.*
Attorneys for defendant: *Dubois & Maynard.*

CLEARE AND FOSTER *v.* CLEARE.

April 27.

Testamentary Suit—Plea, want of knowledge or approval—Notice—Rule 41—Practice.

That the testator knew and approved of the contents of a will propounded is part of the burthen of proof assumed by the person who propounds it, and, consequently, the next of kin who oppose a will may cross-examine the witnesses produced in its support on that matter, as well as upon the capacity of the testator, or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules.

CHARLES CLEARE died on or about the 7th of December, 1868, leaving a will which bore date the 27th of October, 1868, in which, after providing for the payment of his debts, funeral and testamentary expenses, he continued: "I give, devise, and bequeath all the residue of my real and personal estate to Henry Cleare and to George Fifoot Foster, in trust, to apply to such uses as I may hereafter instruct them; but in case no such further instruc-

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tions are left, then I give the same to them absolutely, trusting in their Christian love that they will carry out my wishes as they have been verbally explained to them; and I hereby appoint Henry Cleare and George Fifoot Forster executors." The plaintiffs, as such executors, propounded this will in the usual form: the defendant, James Cleare, pleaded that the will was not duly executed in accordance with the statute, and that on the 27th of October, 1868, the deceased was not of sound mind, memory, or understanding; and as a third plea that the said deceased at the time of the execution of the said alleged will did not know and approve of the contents thereof. And as regards this third plea he gave the following particulars: The substance of the case which the defendant intends to set up is that the alleged will was not read over and explained to the deceased before its execution, and he was not aware that its effect was to give the whole of his property absolutely to the plaintiffs. With his pleas, the defendant gave notice under Rule 41 (Rules and Orders, 1862), that he merely insisted upon the will being proved in solemn form of law; and that if both attesting witnesses were produced by the plaintiffs he only intended to cross-examine the witnesses produced in support thereof.

April 20. *Bayford*, for the plaintiffs, moved the Court to order the third plea to be struck out. If the plaintiffs prove that the deceased was of competent mind, and did execute the will on a particular day, the evidence will be conclusive (unless there be some special circumstances in the case) that he knew and approved of the contents of such will. But if there be any special circumstances, the onus is on the defendant to prove them, and he has precluded himself from doing so by his notice. By the particulars he has given he admits that there is a case to be proved by him. Either the third plea must be struck out or the notice be withdrawn. He referred to *Sutton* v. *Sadler* (1); *Ireland* v. *Rendall* (2); *Hastilow* v. *Stobie* (3); 1 Williams on Executors (ed. 1867), 337.

Searle, for the defendant. This application is premature; it

(1) 3 C. B. (N.S.) 87; 26 L. J. (C.P.) 284. (2) Ante, p. 194.
(3) Ante, p. 64.

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has reference merely to a liability for costs, which can be best determined at the hearing. The plaintiffs are bound to prove by some evidence that the testator knew and approved of the contents of this paper; in fact (as it is set out in the declaration) that he made a will. By the practice of the ecclesiastical courts, the defendant might have cross-examined the attesting witnesses on any point; but if he had imputed fraud or improper conduct to any person, and had failed to prove it, he could have been condemned in the costs. [He referred to *Butlin* v. *Barry* (1); *Goodacre* v. *Smith* (2); *Croft* v. *Day* (3); *Leeman* v. *George and Rosser*. (4)]

Cur. adv. vult.

April 27. LORD PENZANCE. This was an application to strike out a plea, or, at any rate, a notice filed by the next of kin. The next of kin having traversed the due execution of the will and the capacity of the deceased, further pleaded that the deceased at the time of the execution of the alleged will, did not know and approve of the contents thereof, and he gave notice that he only intended to cross-examine the witnesses produced by the plaintiffs in support of the will. I hold it to be clear, since the careful decision in the case of *Sutton* v. *Sadler* (5), that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator, must establish the fact that the testator was competent to make a will when he executed it. This competency forms part of the proposition that a will was made. For if there is no competency—no testable capacity—there can be no will. I am of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of the contents is a proposition implied in the assertion that a will was made by him. For if a man were to sign a paper of the contents of which he knew nothing, it would be no will: *Hastilow* v. *Stobie*. (6) That the testator did know and approve of the contents of the alleged will is therefore part of the burthen of proof

(1) 2 Moo. P. C. 480.
(2) Ante, p. 359.
(3) 1 Curt. 782.
(4) Ante, p. 542.
(5) 3 C.B. (N.S.) 87; 26 L.J. (C.P.) 284.
(6) Ante, p. 64.

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assumed by every one who propounds it as a will. This burthen is satisfied, primâ facie, in the case of a competent testator by proving that he executed it. But if those who oppose it succeed by a cross-examination of the witnesses, or otherwise, in meeting this primâ facie case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate. It follows from this reasoning that the next of kin may cross-examine the witnesses brought to support a will upon this matter, as well as upon the capacity of the testator, or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules. This is sufficient for the decision of this case. But on consulting the authorities in the Prerogative Court, it appears that the liberty of the next of kin to cross-examine the witnesses upon proof made in solemn form without exposing themselves to costs was not confined in all cases to those matters, the proof whereof lay on the party propounding. And it is open to question, therefore, whether the same system ought not to prevail in this court. The application must be rejected with costs.

Attorney for plaintiffs: *George Brown.*

Attorneys for defendant: *Harper, Broad, & Manby.*

May 4.

IN THE GOODS OF F. C. IRVING.

Administration Bond—One Surety—Property re-sworn under an Increased Value—Second Bond—New Sureties—Leave to Sue on First Bond—Refusal.

An administrator executed a bond with one surety under a nominal sum. He subsequently re-swore the value of the property of the deceased at a much increased sum, and executed a fresh bond with two new sureties. He afterwards became a bankrupt, without having duly administered the estate of the deceased; and application was made to the Court for leave to sue on both the bonds.

The Court refused to grant leave to sue upon the first bond until the action on the second had been disposed of.

FRANCES CHARTERIS IRVING, late of Portobello, Edinburgh, died on the 2nd of July, 1867, a spinster, without parent, and intestate. On the 19th of December, 1867, administration of her effects was granted to her nephew, Robert Bruce Johnston, he making oath

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that the whole of her personal estate did not amount in value to the sum of 20*l.*, and he gave bond, jointly with William Augustus Ward, as surety in the penal sum of 40*l.* for his faithful administration of the effects of the deceased. Subsequently, Mr. Johnston re-swore the value of the personal estate of the deceased as under 600*l.*; and on the 24th of March, 1868, he entered into a further bond, jointly with two sureties, namely, James Henry Nuttall and Thomas Calvert Hutton, in the penal sum of 1200*l.* The deceased, Miss Irving, at the time of her death, was indebted to Messrs. Hope & Mackay, of Edinburgh, in the sum of 8*l.* for money lent, for which they hold her acknowledgment. The same gentlemen were also creditors to the amount of 18*l.* for rent due to them, and 13*l.* 13*s.*, funeral expenses of George Augustus Irving, the brother of the deceased, who survived his sister, and was therefore entitled to a distributive share in her estate, but to whom no portion of such share had been paid. On the 25th of June, 1868, a sum of 409*l.* 17*s.* 7*d.*, part of the estate of the deceased Miss Irving, was paid to the administrator, out of which, after payment of the debts and funeral expenses, a sum of 290*l.* should have remained for distribution. Mr. Johnston, although he admitted the debt due to Messrs. Hope & Mackay, had neglected to discharge it, or to distribute the estate amongst the parties interested, and on the 24th of August, 1868, he was adjudicated a bankrupt on his own petition. There is no estate under the bankruptcy, nor any fund out of which the claims against the estate of Miss Irving can be made good, except they can be recovered against the sureties to the bonds. Mr. Johnston has not filed an inventory, or account, of the estate of the deceased in the registry of the Court of Probate. On the 20th of April, 1869, the Court made an order calling upon William Augustus Ward, James Henry Nuttall, and Thomas Calvert Hutton, to shew cause why these two bonds, the first thereof entered into by William Augustus Ward, on the 27th of December, 1867, and the other by James Henry Nuttall and Thomas Calvert Hutton, on the 24th of March, 1868, should not be assigned to Lot Foulkes, of Liverpool, for the purpose of being sued upon respectively. This order was personally served upon Messrs. Ward and Nuttall. Mr. Hutton could not be found. Mr. Ward appeared, and filed an affidavit, in which he stated that he entered into the first bond on

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the faith of representations made to him by Robert Bruce Johnston, and of the affidavit filed by Mr. Johnston to the effect that the deceased's effects did not exceed in value the sum of 20*l.* That, two or three months afterwards, he was asked to execute another bond for a much larger amount, which he refused to do. That, on that occasion, he was informed that the one he had executed was of no use, and had not been used. That, if in the first instance he had been asked to enter into a bond for a large amount, he would have refused to do so. That the only reason why he executed the one he did was the belief that, after Mr. Johnston had paid the expenses of obtaining letters of administration, and of passing the accounts, there would only have remained the sum of 10*l.*, or thereabouts, for the administration of which he could in any way be liable.

Dr. Spinks, Q.C., appeared for Mr. Ward, to shew cause against the order being made absolute. Mr. Ward, on the substitution of the second bond, presumed that his liability had ceased, and that he was no longer called upon to see to the due administration of the estate. As far as he is concerned, the estate has been duly administered, because the probate and testamentary expenses, which have been paid, cover his security. He referred to *In the Goods of Stark.* (1)

Searle, for the creditors. Mr. Ward will be responsible only to the amount of his bond, and his responsibility will not be increased by the estate turning out to be larger than was expected.

[LORD PENZANCE. The complaint of Mr. Ward is, that he became responsible to the amount of 20*l.*, and on that footing he entered into the bond. You are now asking that he may be made responsible for dealing with a very much larger sum.]

Mr. Ward will have an opportunity of setting up any answer he thinks proper in the action brought at common law.

LORD PENZANCE. Ought you not to proceed against the sureties to the second bond first? I think it will be more equitable and fair that that should be done. I shall, therefore, order the bond to be assigned against the other parties, but hold my hand as regards the first bond until I know the result of the suit.

Proctor: *E. W. Crosse.*

(1) Ante, p. 76.

IN THE GOODS OF THOMAS BRIGHTMAN SHARMAN. 1869 May 4.

Will—Residue—Signature of Legatee written under Attestation Clause—Omission of Name in Probate—Practice.

2 P. & M. 303

The deceased made a will in favour of one person only, and after bequeathing to her certain specified articles of property, he added, "and all other chattels;" these last words were held to cover the general residue.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the Court will receive evidence to explain why such signature was written, and if it be satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted in the probate.

THOMAS BRIGHTMAN SHARMAN, late of Leake, in the county of Lincoln, veterinary surgeon, who died on the 28th of September, 1868, executed a will a few hours before his death to the following effect: "I give and bequeath unto my sister, Adelaide Sharman, absolutely, all my house and land and book debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, and everything on the said premises, horse, gigs, &c., and all other chattels.

"Thos. B. Sharman.

"Signed in the presence of us by the testator. "Henry Charrrington. "Mary A. Lancaster. "A. Sharman.

"Leake, Sept. 28th, 1868."

The affidavit of Henry Charrington contained the following account of the making and execution of this will: "On the 28th day of September, 1868, I being a neighbour and an intimate friend of the deceased, called upon him to see him, he being unwell. He informed me that he wished very much to make a will giving the whole of his property to his sister, Adelaide Sharman, who resided with him, absolutely. I, at the testator's request, consented to prepare such a will. I wrote the will out at my own house, and brought it to the deceased. I read the same carefully over to him. He expressed his satisfaction with the contents, and executed it in the presence of Mary Ann Lancaster and of myself, and we then signed as witnesses. The testator's sister was present when the will was executed, but she did not sign as a witness. After I and Mary Ann Lancaster had signed it, it struck

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me it would be desirable that the said Adelaide Sharman should sign her name on the paper on which the will was written, not as witness, but as the universal legatee named therein, and I intimated this to the deceased. He said he thought his sister ought not to sign, but I afterwards, being under the impression that it was the proper course to pursue, requested Miss Sharman to sign the will, and she did so."

The deceased left a father, Mr. George Sharman, who would be entitled to his property, in case he had died intestate. On the 20th of April, application on motion was made to the Court for administration, with the will annexed, to be granted to Adelaide Sharman as the universal legatee named in the will, but the Court refused to grant the motion, and ordered a notice to be served on the father of a renewed application. This notice was served upon him on the 23rd of April, but he did not appear to oppose it.

Inderwick renewed the application. The Court will not preclude the party interested from explaining with what object she put her signature on the paper: *Randfield* v. *Randfield.* (1) If she is not an attesting witness, her signature can form no part of the probate; for, being written under the signature of the testator, it is not a part of the will. On this point he referred to the following cases: *In the Goods of Mitchell* (2); *In the Goods of Forest* (3); *In the Goods of Smith* (4); *In the Goods of Raine.* (5)

As regards the interest of Adelaide Sharman under the will, it is evident that the only person the testator desired to benefit was his sister, and he makes her his residuary legatee; for the words *all other chattels* are sufficient to cover the residue of his property. As the will was drawn by the testator himself, the Court will not construe its wording too strictly: *Michell* v. *Michell* (6); *Campbell* v. *Prescott* (7); *Kendall* v. *Kendall* (8); *Arnold* v. *Arnold* (9); *Parker* v. *Marchant.* (10)

LORD PENZANCE. There are two questions in this case—first, whether a grant can go at all to the applicant; and, secondly,

(1) 30 L. J. (Ch.) 179, n. 1.
(2) 2 Curt. 916.
(3) 2 Sw. & Tr. 334; 31 L. J. (P. M. & A.) 200.
(4) 3 Sw. & Tr. 589; 34 L. J. (P. M. & A.) 19.
(5) 34 L. J. (P. M. & A.) 125.
(6) 5 Mad. 69.
(7) 15 Ves. 500.
(8) 4 Russ. 360.
(9) 2 My. & K. 365.
(10) 1 Y. & C. Ch. 290.

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whether the probate ought to issue with or without her name as witness. In a case decided by Sir C. Cresswell, he held that under ordinary circumstances it is not the duty of this Court to ascertain if there be two attesting witnesses, whether the name of a third person appearing on the face of the will was written as attesting the signature of the testator or not, but that such a question would be more properly raised in a Court of Construction. No doubt, however, there are some considerations on this matter which deserve to be carefully weighed; amongst others, that this Court is bound not to send up to the Court of Construction anything which does not form part of the will itself. Now, if the name is not the name of an attesting witness, it is not a part of the will, and ought not to appear in the probate. In the present case such a duty is forced upon the Court, because, not only the question what is the will, but also the question to whom the grant shall go, depends upon the previous question, whether Miss Sharman is interested under the will or not. If she attested the signature of the deceased, she forfeited all interest under the will; if she did not attest the signature, her name forms no part of the will. On the evidence before me, I can have no hesitation in saying that she did not attest the signature of the deceased. When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterwards adds his name, the Court will not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness. The next question is, whether the grant can go to Miss Sharman as residuary legatee. I think she is residuary legatee. There is a great deal in the observation that she is the only person interested under the will. The will is extremely short. The testator gives to his sister absolutely all his house and land and book debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, and everything on the premises, horse, gigs, &c., and all other chattels. The fair meaning is, that he gives everything to his sister, and therefore she is the residuary legatee. Administration with the will annexed will issue to her, but the grant will not include her name written at the foot of the will.

Attorneys: *W. & H. V. Sharp.*

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May 11.

IN THE GOODS OF ALLCHIN.

Will—Wrong Date—Probate granted—Alteration of the Date—Endorsement.

The Court may order a memorandum to be endorsed on a probate after it has issued, as to the true date on which a will was executed, if satisfied that the date given in the probate is erroneous.

CHRISTOPHER ALLCHIN, of Finchley, Middlesex, died on the 26th of April, 1865, leaving a will in which he appointed Joseph White and William Maffey, executors, but did not dispose of the residue of his property. On the 19th of August, 1865, on the renunciation of the executors, administration with the will annexed of the estate and effects of the deceased, was granted to Christopher John Newton Allchin, the eldest son and heir at law of the deceased. In this grant, and in the original will, the date of the will is stated to be the 11th of January, 1863. In October, 1866, Mrs. Jones, a daughter of the deceased, instituted a suit in the Court of Chancery, to administer the estate of the deceased, and in the course of the proceedings there it was discovered that the true date of the will should be the 11th of January, 1864, whereupon Vice-Chancellor James suspended the proceedings before him, in order that an application might be made to the Court of Probate, to amend the letters of administration by stating the true date of the execution of the will. Affidavits were filed from the law stationer, who stated that the will was engrossed in his office and the year 1863 inserted in the engrossment by one of his then clerks in the month of December in that year, and that the rest of the date was left in blank; and from Mr. Goatly, one of the attesting witnesses, in whose handwriting the date (with the exception of the year) is, setting out facts which conclusively proved that the will was executed in January, 1864.

Pritchard moved the Court to direct that the date in the will of the deceased, and in the copy of the said will in the grant of letters of administration should be rectified, or that the true date of the execution of the will by the testator should be entered or notified upon the proceedings filed in the registry, and upon the letters of administration.

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Bayford appeared for the widow of the deceased and two children.

LORD PENZANCE. I think it belongs to the functions of this Court to inquire into the true date when a will was executed, as well as into the question whether it was duly executed. The parties might have applied, in the first instance, before the probate issued, to have had the date set right, but they did not do so. The administrator now comes to this Court under the directions of the Vice-Chancellor. I am satisfied that the true date was the 11th of January, 1864, and I shall order the grant to be so amended as that it will shew on the face of it that the will was executed on that day.

Attorney for administrator: *W. H. Gatty Jones.*
Attorneys for widow: *Norris, Allens, & Carter.*

ATTER AND OTHERS *v.* ATKINSON AND ANOTHER.

March 12.

Testamentary Suit—Will—Pleading—Knowledge and approval of Contents by Testatrix—Evidence.

If it be proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will be held to extend to every part of the will.

THE plaintiffs Mary Agnes Atter, Henry Johnson, and James Edward Atter, propounded the will of Sarah Newcombe, of Stibbington, in the county of Huntingdon, and of Stamford, in the county of Lincoln, widow, who died on the 10th of November, 1866. The will bore date the 3rd of July, 1865, and in it James Atter was named sole executor and residuary legatee and devisee. James Atter died on the 23rd of November, 1866, leaving a will and codicil by which the plaintiffs were appointed executors, and of which they took probate. The defendants, two of the next of kin of Sarah Newcombe, pleaded that her will was not executed in accordance with the Wills Act; that it was obtained by the undue influence of James Atter; and that at the time of the execution of it the deceased did not know and approve of its contents. The

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particulars of this last plea were, that prior to the alleged execution of the said alleged will by the said deceased, the same was not read over, nor were the contents thereof explained, to the said deceased, and that at the time of the said execution the said deceased did not know that the said James Atter was, nor did she intend that he should be, named as residuary legatee to the said will. Issue was joined on these pleas, and the cause was tried before Sir J. P. Wilde and a special jury. The only witnesses examined for the plaintiffs were the attesting witnesses. Mr. Torkington deposed that he was a solicitor. That on the 3rd of July, 1865, he called upon Mrs. Newcombe, and was shewn into her sitting room. She came into the room with the will in her hand. He asked her if she had read it, and she answered she had, and she seemed perfectly satisfied with it. He waited until Wigmore came. He then asked her again whether she had read it. She answered yes, and the will was executed in his presence, and in that of Wigmore. Nothing more was said about the contents. On cross-examination, he only knew she was aware of the contents because she said she had read it. James Atter asked him to see it executed, because there were some pecuniary legacies to his (Atter's) daughters in it, but Atter said not a word about any benefit to himself. Mrs. Newcombe was an elderly lady between seventy and eighty. She was shrewd in business, and very chatty and communicative. Mr. Wigmore deposed that he had been clerk to Mr. James Atter from 1862 until the time of his death. On the 3rd of July, 1865, he went to Mrs. Newcombe's residence and found Mr. Torkington there. Before Mrs. Newcombe signed the will, Mr. Torkington asked her if she had read it. She said, "Yes, Mr. Torkington, it is just as I wish;" or "It is to my wishes." The will was lying open before her. It was signed in the presence of Mr. Torkington and of himself. On the part of the defendants it was shewn by evidence, and on cross-examination, that Mrs. Newcombe had on several occasions subsequent to the execution of the will expressed her surprise at, and disapproval of, the effect of the residuary clause. This evidence was not objected to on the part of the plaintiffs.

Dr. Deane, Q.C., and *Bayford*, appeared for the plaintiffs.

Dr. Spinks, Q.C., and *Pritchard*, for the defendants.

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SIR J. P. WILDE, in summing up, made the following observations to the jury:—On the evidence in this case a question arises of a kind of which in the course of my experience I do not recollect an instance, and it is one which deserves great attention on your part, and great care as to the course you take; for where a man who signs a will is admitted to be at the time of sound mind and capacity, it will be an extremely dangerous thing afterwards to inquire how far he understood each and every disposition made in such will at the time he executed it. Still it is quite within the function of a jury to deal with such a matter, and the object I have in making these remarks is to point out to you that you ought to deal with it carefully. The general proposition for your consideration is this: this old lady having undoubtedly executed the will propounded, did she, when she executed it, know and approve of the clause which gives the residue to the attorney who made it? It is contended on the part of the defendants that she did not, inasmuch as when she was spoken to afterwards about the will, she seemed then, for the first time, to have found out the effect of the residuary clause. You will recollect, however, that her observation on this matter was followed by or coupled with others, which applied to the legacies to the daughters of Mr. Atter; and in giving instructions for a new will, she did not confine herself to undoing what was wrong in the old one, but varied in a vast number of particulars from her former testamentary intentions. So that we must mind this: we must not confound a change of mind of the testatrix, which took place at a subsequent period, and was partly produced perhaps by Mr. Atter's drunken habits, and partly by an alteration of her testamentary intention towards others than the members of Mr. Atter's family; we must not confound this change with a mistake or misunderstanding as to the contents of the will itself at the time she executed it. Now, in the making of a will, there is nothing more important than the dealing with the residue. It commonly happens that a man desires to dispose of his property as of a fixed sum, and he distributes that amount in the way he thinks desirable; and when anything is said to him about the residue, he is indifferent

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what becomes of it, because he does not esteem it of any value, and yet it may turn out that he who takes the residue in this way is the person who is chiefly benefited by the will; for it may well be that between the date of the will and his death the testator becomes entitled to a large property. There is another general observation I will make as regards this case. The counsel for the defendants has said truly that the law requires that those who have to judge of a will should be satisfied, upon very good and sufficient evidence, that the contents of the will were made known to and approved by a testator in a case in which the person who has drawn the will is the person who is himself largely benefited. There is no special rule applying to attorneys, but the force of the observation is obviously increased in such a case, for we know that a person making a will confides more in a professional man than he generally does in any other person he may call in to assist him. The proposition, however, is undoubted that if you have to deal with a will in which the person who made it himself takes a large benefit, you ought to be well satisfied, from evidence calculated to exclude all doubt, that the testator not only signed it, but that he knew and approved of its contents. And now let us follow the transaction itself. This lady made a will in 1864, which however does not now exist. I think it is conceded by the parties that no previous will gave the residue to Mr. Atter. But there is a paper which certainly casts a very strong light upon this matter, namely, the instructions for the will of 1864. You well know that when an attorney takes instructions from a client, after talking to him, he jots down on a piece of paper in a rough way what is intended to be the substance of the will. Such a document is quite different from a draft. In the original paper of instructions, dated Wansford, 1864, there is not a word about the residue being given to Mr. Atter. These instructions contained in pencil in Mr. Atter's handwriting the words "*balance to J. A.*" The evidence of Mrs. Newcombe's knowledge of the contents of the will is contradictory. At any rate it amounts only to this. She was asked, had she read the will? She said, yes. Was it satisfactory? yes; and thereupon it was executed. We now come to the will of 1865. That will, it is said, was written from a draft which is here, and the draft undoubtedly contains the residuary clause. I do not find any paper of instructions; but

this draft was copied from the will of 1864, and in the instructions for that will appears the passage, "Balance to J. A." These words are in pencil, put in at a subsequent time by Mr. Atter himself. It is undoubted that they never met the eye of Mrs. Newcombe; therefore, except so far as you are satisfied from what afterwards took place, that Mrs. Newcombe was aware, from reading the will, what it contained, it does not seem that she was made acquainted with the contents from any previous paper put before her, or from any previous conversation. Supposing the whole transaction had been fair, and that Mrs. Newcombe had expressed an intention to leave the residue to Mr. Atter, the first thing you would expect would be (what Mr. Atter indeed did) that he would take care that some one else should attend the execution of the will. But he should have gone further. He ought to have told Mr. Torkington to be careful to read it over to the testatrix, in order that she might understand what she was doing. But what did Mr. Atter say? According to Wigmore's and Torkington's evidence, he said, "Let Mr. Torkington go to her and ask her whether she has read the will." Mr. Torkington carried out his instructions with wonderful abstinence, for he never put a question to her about the will, except, "Have you read it?" "Yes." "Are you satisfied?" "Yes." And having asked that once, he asked it again, when the clerk entered the room. This does seem very extraordinary. The almost universal practice for an attorney to read over and explain to a client a will he is about to see executed, was not pursued on this occasion. That duty is especially necessary to be observed in the case of a woman, who often has less experience in business than a man. The testatrix is stated to have come into the room with the will in her hand. She is asked, "Have you read it?" "Yes." "Are you satisfied?" "Yes." That is the only evidence that she ever did read it, or that its contents were made known to her. The question was not raised, but according to some of the decisions it is doubtful whether even this statement of the testatrix was properly admissible. The first question is, are you satisfied she said so? and then, are you satisfied that if she said so, she had really read the will? Because many a person who has had a long paper put into his hand may say he has read it, when he may have only glanced over it. Is it

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not possible that, having confidence in Mr. Atter, and having noticed that the legacies were given as she intended, she skipped the latter part, under the impression that it contained merely formal clauses? And how can we be sure she read it merely because she said she had done so? The difficulty arises from a professional man not doing as he ought to have done, not having read over the paper to his client in the presence of the clerk. Undoubtedly and unhesitatingly, I tell you that it is the plaintiff's business to satisfy you affirmatively, and on very satisfactory evidence, that the testatrix really did know and approve the contents of this will at the time she signed it; and if he has not done so to your satisfaction, you ought to return a verdict for the defendants. There is a proposition of law, however, which I consider it is my duty to put before you. The question of fact is, did Mrs. Newcombe really ever read the contents of this document? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to shew that she knew and approved of its contents. Reflect on the contrary proposition. Suppose that a long will with a number of complicated arrangements, is read to a competent testator, and is executed by him, if we were permitted some time after his death to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered. The real, practical question in this case is, did Mrs. Newcombe ever read the residuary clause? Was it ever brought to her notice in that or any other way before the execution? If you think she was of a sound and capable mind, and really did read the will through, and put her name to it, she was bound by that act, and there is an end of the matter.

The jury, after consideration, gave in a verdict, "We find for the will, but that the testatrix did not understand the full effect

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of the residuary clause when she signed it." Having been required to reconsider their verdict, Sir J. P. Wilde, with the consent of counsel, forwarded to them the following written direction: "If testatrix knew and understood that the will gave all the rest of her property beyond the legacies to Mr. Atter, it is not necessary she should have understood or appreciated how large a sum the rest or residue would amount to."

The jury were ultimately discharged, not having been able to agree upon a verdict.

Proctor for plaintiffs: *C. Waddilove.*
Attorney for defendants: *Rogerson and Ford.*

IN THE GOODS OF MCVICAR.

May 25.

*Will made under a Power of Appointment—Revocation by Marriage—Person Entitled as Next of Kin—*1 *Vict. c.* 26, *s.* 18.

By the will of A., a power was given to B. under certain circumstances to dispose by will, of certain property, and in default of her appointment, the property was to devolve on the person or persons who, at her decease, should be her next of kin. B., in pursuance of such power, executed a will in favour of a person whom she afterwards married, but who died in her lifetime:—

Held, that the personal estate appointed by the will of B. would not, in default of such appointment, have passed to the person entitled as her next of kin under the Statute of Distribution; and, consequently, that her will was not revoked by her subsequent marriage.

MARY ANN MCVICAR, of Waterloo, Lancashire, widow, died on the 3rd of April, 1869, leaving Nicholas Magraw, her lawful uncle, and one of her next of kin. Nicholas Magraw, the elder, by his will which was proved in the Prerogative Court of Canterbury, in April, 1856, gave and devised unto his trustees therein named, certain real and personal property upon trust to permit his great niece, Mary Ann Magraw (afterwards Mary Ann McVicar), the daughter of his nephew, John Magraw, to have the use and enjoyment thereof during her life, and from and after her death in trust for her children, and in case there should be no child, in trust for such person or persons, and in such manner generally as she should by her will appoint, and in default of such appointment, in trust

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for the person or persons who, at her decease, should be her next of kin. The trustees and executors named in this will were Morris Hore and Edmund Joseph Hore. On the 14th of January, 1863, Mary Ann McVicar, then Mary Ann Magraw, duly executed her last will and testament in writing; in which, after reciting the power given to her by the will of her great uncle, and referring to her then intended marriage, and to the fact that in view of the possibility of there being children of such marriage, who should become entitled under the provisions of the said will, she had determined to exercise such power, she directed and appointed that the trustees or trustee for the time being of the will of her said great uncle, Nicholas Magraw, should stand seised and possessed of the said trust property upon trust to raise and pay thereout to her old servant Margaret, the wife of Oliver Petty, a sum of 50*l.*, and that subject thereto the said trustees should stand seised and possessed of all and singular the said trust property, upon trust for Duncan McVicar, his heirs, executors, administrators, and assigns, absolutely according to the nature and quality thereof respectively, and she appointed the said Duncan McVicar sole executor. After the execution of this will, Mary Ann Magraw intermarried with the said Duncan McVicar, who died in her lifetime. Mary Ann McVicar died possessed of considerable personal estate in her own right, and in addition to the property over which she had a power of appointment.

Bayford moved the Court to decree administration, with the will of Mary Ann McVicar annexed, to Nicholas Magraw, her uncle, and one of her next of kin. The will was not revoked by the deceased's subsequent marriage, because it came under the exception of the 18th section of the Wills Act. According to the construction of the Court of Chancery, the words next of kin alone apply to a much more limited class than the next of kin under the Statute of Distribution. He referred to *Elmesley* v. *Young* (1), *In the Goods of Sir C. A. Fitzroy* (2), and *In the Goods of Charlotte Fenwick.* (3)

LORD PENZANCE. That, I think, is the true view of the case.

(1) 2 My. & K. 780. (2) 1 Sw. & Tr. 133.
(3) Ante, p. 319; 36 L. J. (P. & M.) 54.

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In *Elmesley* v. *Young* (1), when decided on appeal, it was held that the words next of kin, taken alone, do not imply the same class as the words next of kin under the Statute of Distribution. The will under which the power was given, provided that in default of the power not being exercised, the property should go to the persons who, at the time of the death of deceased, should be her next of kin. The only question therefore, is, adverting to the terms of the 18th section of the Wills Act, were such persons properly her "heir, customary heir, executor or administrator, or the persons entitled as her next of kin under the Statute of Distribution." I think not, because the words next of kin alone mean something different from next of kin under the Statute of Distribution. In this case, therefore, the will falls under the exception of the 18th section of the Wills Act, and is not revoked. Before administration can issue to the next of kin, the trustees of Mr. Magraw's will, who are residuary legatees in trust under the will of Mrs. McVicar, must renounce.

Proctor: *Ayrton.*

PECHELL *v.* HILDERLEY AND OTHERS.

June 8.

Will and Codicil not duly executed—Document endorsed on back of Will, headed 2 Codicil, and executed in accordance with the Form but not valid by the Law of the Country where made—Confirmation—Foreign Law—24 & 25 Vict. c. 114.

2 P.D. 95, 7

The deceased wrote on the back of his will, which was not duly executed, a document headed "2 codicil." This document, although it was properly executed according to the law of the country where made, could not by that law have an independent existence, or establish the will by reason that it was endorsed upon the will and referred to it:—

Held, that neither the will nor codicil could be admitted to probate.

In determining the question what papers are testamentary under the provisions of the statute 24 & 25 Vict. c. 114, the Court will have regard to the law of one country only, and will not mix up the legal precepts of different countries.

HORACE SEYMOUR KERR PECHELL, formerly a captain in the Royal Artillery, died on the 20th of December, 1867, at Alton House, Alton, Hampshire. Amongst his papers was found one endorsed as his last will and testament, August, 1863. It was a half-

(1) 2 My. & K. 780.

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sheet of paper. On one side was written in the handwriting of the deceased what purported to be a will. This was headed, "Last will and testament of Capt. H. S. K. Pechell, R.A., East Indies, 11th of August, 1863," and was signed by the deceased in the presence of one witness, and had a second date at the foot, "Mhow, 1st of August, 1864." By this document the deceased appointed Eliza Hilderley residuary legatee, but he did not name therein any executor. On the second side of the paper were endorsed the following bequests: "Codicil, April, 1866. I hereby leave 50*l.* to Caroline Ann Pechell, Bix, Henley, Oxon.—Horace Seymour Kerr Pechell. Florence." And "2 codicil,—I hereby leave to Signor Zenoni Pineschi (five hundred pounds) annuity, payable by my bankers, Messrs. Flury & Heraid, Paris.—Horace S. K. Pechell. Genoa, June 20th, 1867."

The plaintiff having cited all the persons interested in this paper to propound it, an appearance was entered for Elizabeth Hilderley, the residuary legatee named in the first paper, and on her death in October, 1868, the suit was revived against the defendant Daniel Hilderley, her father, and only next of kin, who, in his declaration, propounded the above papers as a will and two codicils of the deceased; that the said will was executed in the presence of witnesses in the usual form. That the first of the said codicils was wholly in the handwriting of the said deceased, signed and dated by him at Florence, in the kingdom of Italy, and made according to the forms required by the laws of Italy. That the second of the said codicils was wholly in the handwriting of the said deceased, and signed and dated by him at Genoa, in the kingdom of Italy, and was made according to the form required by the laws of Italy, and both such codicils were endorsed on the said will. And, further, that the said paper writings upon the face and back of the said testamentary document are testamentary dispositions made by the deceased wholly in his handwriting and signed by him, and that the last endorsement is a codicil and testamentary disposition confirming and incorporating the preceding written disposition, and was made by the said deceased, a British subject, then residing in parts beyond the seas, to wit, Genoa, in the kingdom of Italy, and is wholly in his handwriting, and is executed in a manner valid according to the provisions of the laws of the said kingdom of

Italy. The plaintiff pleaded denying the due execution of either of these documents either by the laws of England or Italy, and further, that the paper writing bearing date the 20th of June, 1867, if duly executed, did not confirm or incorporate the paper writings bearing date the 1st of August, 1863, and April, 1866. The Court having directed that the cause should be heard before itself, and on affidavits, an affidavit was filed as to the law of Italy made by Signor Joseph Ottolenghi, to the following effect:—"By the civil code, in force throughout the whole kingdom of Italy, it is enacted in the preface article 9 that the substance, the effect of donation and testamentary disposition, are considered to be regulated by the national law of the bestower, but that the extrinsic form is established by the law of the country in which such donation or testamentary dispositions are made. Every case, however, in which a different intention is plainly demonstrated is excepted. That by Articles 775 and 804 of the said code it is enacted that a holograph will, and other testamentary disposition, to be valid, must be written all through by the hand of the testator himself, who must also with his own hand date and subscribe it. The date must indicate the day of the month and the year. The subscription must be written at the end of the disposition. If either or any part of these regulations is omitted, the testamentary disposition is null and void. That by Article 917 of the said code it is enacted that testaments can be wholly or partly reversed by a posterior one, or by an act received by a notary before four witnesses. And I further say that having examined the endorsements on the said paper, the first of which purports to have been written at Florence and the last at Genoa, I can declare that, according to the testamentary law of Italy as contained in the said Civil Code, the first of such endorsements is altogether void as a testamentary disposition, the day of the month being wanting to the date therein written. That the second endorsement, assuming that the whole and each word thereof was written by the testator, would, taken by itself, so far as the extrinsic form is concerned, be valid as a testamentary disposition, but as a codicil containing merely an amendment to a will, the Italian courts would not give it an independent existence, and would consider it to be valid or invalid according as the will to which it related is valid or invalid. And I further say

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that by the testamentary law of Italy, a will which is not itself executed in accordance with the requirements of the civil code of that country, and which is therefore invalid, will not acquire validity by the fact that a testamentary disposition properly executed is afterwards endorsed upon the back of it, even although such testamentary disposition refers in express terms to the date or contents of such will."

Underdown, for the defendant, contended that the document dated the 20th of June, 1867, was a valid testamentary instrument under 24 & 25 Vict. c. 114, as having been written by the deceased, and having been signed and dated by him in accordance with the provisions of the laws of Italy, in which kingdom it was made. That by reason of its being written on the same paper with the other documents dated August, 1863, and April, 1866, and being headed "2 codicil," it must be held to confirm and make valid such documents, and that they must be all taken together to be the will of the deceased, and be admitted to probate. [He referred to *Gordon* v. *Reay.* (1)]

Dr. Middleton, for the plaintiff, contended that the principle of confirmation, as understood in England, is not applicable to a foreign holograph will, otherwise it might cease to be holograph. That as no one of these documents was valid, either by the laws of England or of Italy, they could not be made valid by a combination of both laws. In order that an unexecuted paper should confirm and render valid an insufficiently executed paper, there must be a distinct reference in the former to the contents of the latter: *In the Goods of Drummond.* (2)

June 8. LORD PENZANCE. The testator in this case left behind him a paper writing purporting to be a will. It was executed by him in India, and at that time was not witnessed by more than one witness, if witnessed at all. This paper, it is admitted, fails for want of due execution, unless it is set up by one or other of the two codicils which are endorsed upon it. The first codicil appears to have been written three years after the will, when the testator was at Florence. It is holograph, and signed by the testator, but is not witnessed. It is also dated so far as the month and year are

(1) 2 Sim. 274. (2) 2 Sw. & Tr. 8.

concerned, but not the day of the month, for it is headed "Codicil, April, 1866." The second codicil is also holograph, and signed by the testator, and is further fully dated. It is headed "2 codicil." This codicil was executed at Genoa. Neither of these codicils having been duly executed according to the English statute, the first question that arises is, whether either of them was so executed as to constitute a valid testamentary disposition according to the law of Italy. The affidavit of the Italian advocate, which has been laid before the Court, establishes the contrary. As to the first codicil, it appears that the execution fails for want of the full date (including the day of the month) being inscribed thereon. As to the second codicil, it appears that the execution is sufficient, but that being only a codicil to a will, it would not be upheld by Italian law as an independent paper, and that unless the will were valid, the codicil must fail with it. The affidavit further states that by the Italian law this codicil would have no operation upon the will, though endorsed upon and referring to it. The will therefore being originally invalid, and the codicil having neither the effect of establishing it, nor the right to be considered a testamentary paper standing alone, neither of these papers would be held valid in Italy, the country where the codicil was made. It was, however, further argued that by regarding the validity of these papers, partly according to Italian law and partly according to English law, a valid will and codicils would be the result. The Court was invited to regard so much of the Italian law as held the second codicil well executed, and then dropping the Italian law, and recurring to the English law, to hold that this paper being well executed, being endorsed upon the will, and referring to it, operated as a republication of the will, and thereby established it. Whether such would be the effect of applying the English law in the manner proposed, it is not necessary to discuss, for I am of opinion that in determining the question whether any paper is testamentary, regard can be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries can only result in conclusions conformable to neither. The Court, therefore, pronounces against all the papers.

Attorneys for plaintiff: *Young & Jackson.*

Attorneys for defendant: *Travers, Smith, & De Gex.*

Dicta of LORD PENZANCE, at p. 682.
applied. Re VERE-WARDALE (*decd.*).
[1949] 2 All E.R. 250.

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June 15.

WRIGHT *v.* ROGERS AND GOODISON; WINTERBURN INTERVENING.

Will—Execution—Signature of Witness in presence of Deceased—Adverse Evidence of Surviving Attesting Witness.

The deceased signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the deceased, an affidavit was required as to certain interlineations which appeared on the face of the will, and such affidavit was prepared by the clerk on a printed form, the blanks being filled in by him. This affidavit was sworn to by the attorney and contained the usual clause of due execution, more especially that the witnesses had signed their names in the presence of the deceased. After the death of the attorney, the clerk for the first time gave information that the will was not signed by the witnesses in the presence of the deceased, but in the attorney's office, and at the trial gave evidence to the same effect. No other witness, either to disprove or corroborate this statement, was produced. The Court, on a review of all the circumstances, declined to act upon the recollection of the surviving witness, and decreed probate of the will as duly executed.

THOMAS PEARCE, late of Albion Grove West, Islington, died on the 4th of April, 1868, and on the 23rd of April, 1868, probate of his last will and testament, bearing date the 2nd of April, 1868, was granted in the principal registry of the Court of Probate to Richard Rogers and Richard Goodison, the defendants, the executors named in such will. On the 23rd of March, 1869, on the application of the plaintiff, Caroline Wright, a citation issued, calling upon the defendants to bring in the aforesaid probate, and to shew cause why it should not be revoked and declared null and void. The defendants thereupon propounded the will, and the plaintiff pleaded that it was not executed in accordance with the statute 1 Vict. c. 26, and that on the day the same bears date the deceased was not of sound mind, memory, and understanding. By the will propounded the testator gave two-thirds, the residue of his estate, to Jane Whipp (now Jane Winterburn), the intervener, absolutely, and he directed that the remaining one-third should be invested, and the income thereof be paid to the plaintiff, Caroline Wright, for her sole and separate use, without power of anticipation, and, at her death, the principal to be divided amongst her children, and in case she should leave no children, then such one-third part to form part of the residue of his estate. This will, which had a full

attestation clause, was executed in the presence of an attorney, Charles Bell, and his clerk, James Edward Haynes. By a will executed by the deceased at an earlier hour than the last will, but on the same day, the one-third of the residue was left to Caroline Wright absolutely. In consequence of certain interlineations appearing on the face of the last will, an affidavit was required from one of the attesting witnesses before probate could issue. Accordingly, a printed form was obtained, which was filled in by J. E. Haynes, and the affidavit was sworn by Charles Bell. This affidavit contained the usual clause (which was printed, with the exception of the word *will*), "we thereupon attested and subscribed the said will in the presence of the said testator." Mr. Bell died on the 17th of March, 1869. The other attesting witness, Mr. Haynes, gave the following account of what took place at the execution: "I accompanied Mr. Bell in a cab to Mr. Pearce's, and on the street door being opened we were admitted into the passage by Miss Whipp, and shewn into the parlours. Mr. Pearce was lying in bed in the front parlour, and Mr. Bell went to the bedside, and I walked into the back parlour, and at that distance I observed what took place (the parlours having folding doors, which were thrown open, enabled me to do so). Mr. Bell first read to deceased, or said something to him, about a deed of revocation (1), and laid it down on the table, and then he read the will. When Mr. Bell had finished reading the will, he beckoned to me to come into the front room, and the bell was rung for pen and ink. Miss Whipp answered the bell (she having been previously requested by Mr. Bell to retire), and produced the pen and ink, and raised the testator up, and so held or supported him while he executed the will. Having executed the will, the testator sunk down in the bed in a very exhausted state, and, as I thought, in a dying state, and Mr. Bell seemed to have the same impression, for he said to me, on our retiring to the back room, 'that was a very near thing.' Miss Whipp remained in the front parlour, and was shortly afterwards joined by Mr. Bell. After waiting in the back parlour

(1) This deed had reference to a post-nuptial settlement, executed by the deceased, in which settlement he had reserved to himself a power of revocation, and such power, in consequence of the death of his wife, he desired to exercise.

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about an hour, I saw Miss Whipp beat an egg and mix it with a liquid, which she put to testator's mouth, and he swallowed it. He appeared to revive a little, but not sufficiently to be enabled to sit up, and Miss Whipp tried to raise him in bed, but was not strong enough, whereupon she summoned Mr. Windred into the room, who lifted Mr. Pearce bodily up into a sitting position, in which position Miss Whipp supported him, and Windred left the room. The testator then received the pen from Mr. Bell to execute the revocation, but being too weak to write, Mr. Bell directed me to guide testator's hand, which I did, and the matter was completed. The anxiety consequent upon Mr. Pearce's condition, and my and Mr. Bell's watchfulness for an opportunity to get the deed of revocation executed (which, pro formâ, should have been done before the execution of the will), caused us to neglect the attestation of the will in the presence of the testator. In fact, neither the will nor the deed of revocation were attested until we returned to the office, for, as soon as the deed of revocation, which had been so anxiously watched for, had been executed, Mr. Bell hastily snatched up both documents, unattested. Mr. Bell being anxious to get back to his business, we hastily left the testator's house, jumped into a cab, and returned to the office. Upon arriving at the office, I immediately pointed out to Mr. Bell that the will had not been attested, whereupon Mr. Bell said, off-handedly, that it did not matter, and, at Mr. Bell's request, both the deed of revocation and the will were attested by us at Mr. Bell's office in Bedford Row." This account was written by Mr. Haynes a few days after the death of Mr. Bell, at the request of Mr. Middleton, who had succeeded Mr. Bell in his business. In the first instance Mr. Haynes avoided saying anything about the attestation of the will, and added the latter part of the statement on his attention having been called to the omission by Mr. Middleton. On his examination in Court he confirmed the above statement, but he admitted that he told no one before he wrote down the statement that the will was attested in the office. Soon after Mr. Bell's death, Mr. Middleton asked him to rough-draw a statement as to the business of the execution of the will and the deed of revocation, and he then told him that the attestation was done in the office. In the original statement he said nothing about the attestation; but, on Mr. Middleton

writing in pencil at the foot of the statement, "Query whether the will was attested in the front or back room?" he added the latter part. He further admitted, that the affidavit sworn to by Mr. Bell was prepared by him, and so far as it was in writing, was written by him. In answer to further questions from counsel, he said that he did not know at the time whether an attestation in a separate room was legal or not. He first knew it was invalid when counsel's opinion had been taken. He thought that the will having been read over to the testator, and he having signed in the presence of the witnesses, the execution was sufficient. Mr. Bell was an experienced man of business, and very accurate, and must have superintended the execution of a vast number of wills. The only other witness called was Mrs. Winterburn, and she merely denied that she took in the pen and ink for the execution of the will. The pen and ink were all the time in the back parlour, and she never entered the room from the moment she was requested to retire until after the will was executed.

Dr. Spinks, Q.C. (*Dr. Tristram* with him), appeared for the defendants. He relied on *Owen* v. *Williams*. (1)

Serjeant Ballantine (*Inderwick* with him), appeared for Mrs. Winterburn, the intervener.

Keane, Q.C. (*Dr. Swabey* with him), appeared for the plaintiff.

LORD PENZANCE. The question for my decision is, whether this will has been duly executed. It is proved that the will was signed by the testator in the presence of two witnesses, an attorney and his clerk, that the attorney was a gentleman of long experience, and that the will had at the time a perfect attestation clause, which was signed by the witnesses. Primâ facie, therefore, there cannot possibly be a stronger case in which the Court might presume that the will was duly executed. But the evidence does not end there; for, after the death of the testator, an affidavit, which was written out by this same clerk, was sworn to by Mr. Bell, and this affidavit shewed that the will was duly executed. The will was thereupon proved, and afterwards Mr. Bell, one of the attesting witnesses, died. After his death, Mr. Middleton, the then employer of Haynes, the

(1) 32 L. J. (P. M. & A.) 159.

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clerk, asked him to make a statement as to the execution of this will, and he did so in writing. That statement is now before me. Amongst other things, it states that Miss Whipp answered the bell when it was rung, that she produced the pen and ink, and supported Mr. Pearce when he signed his name. All this, however, Miss Whipp denies. It appears that Mr. Middleton, on reading this statement, observed that nothing was said in it about the attestation of the will. He thereupon wrote in pencil, "Query, whether the will was attested in the front or back room," and then, for the first time, Haynes said that the will was attested in the office in Bedford Row. I asked him whether he had told any one of this defect in the execution before, and he answered he had never mentioned it to any one. This query by Mr. Middleton was therefore rather curious. Without directing Haynes to refresh his memory, directly, by looking at the attestation clause, he asks him to give his account of the transaction. The question having been put, is answered, and Haynes told the same story he told us to-day. I think too much has been said about the probability of this story. It is not necessary to assume that the witness comes here to deceive the Court. The question is whether the Court is able to rely upon his memory. He may have mixed up two transactions, for a deed of revocation was executed at the same time as the will. The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed. Such was the case of *Croft* v. *Croft*. (1) Here we have only the evidence of one witness, and we find the signature of the other attached to a full attestation clause. Taking all the circumstances into consideration, I have come to the conclusion that the will was well executed, and that I ought not to rely upon the recollection of the witness, seeing that, if he did not himself, in the first in-

(1) 4 Sw. & Tr. 10.

stance, affirm the due execution of the will, he stood by and assented to his fellow witness making such affirmation. 1869

WRIGHT v. ROGERS.

Attorneys for plaintiff: *Hensman & Nicholson.*
Attorneys for defendants: *Belfrage & Middleton.*

IN THE GOODS OF A. HICKS.

Will—Memorandum of Revocation—Probate.

June 22.

The deceased at the foot of his will wrote the following words:—"This my last will and testament is hereby cancelled, and as yet I have made no other." He signed his name to this memorandum in the presence of two witnesses, who attested the execution. The Court ordered administration to issue with the memorandum annexed.

ALGERNON HICKS, of 45, Connaught Square, Hyde Park, Middlesex, died on the 26th of April, 1869. On the 4th of August, 1864, he duly executed a will, in which he appointed his wife, Priscilla Hicks, and his brother, Francis Edward Hicks, executrix and executor, and Francis Edward Hicks residuary legatee. On his death, this will was found with several paragraphs of it, and also the signature of the deceased, struck through with a pen, and with the following memorandum under the original signature of the deceased:—

"This my last will and testament is hereby cancelled, and as yet I have made no other.

"A. Hicks, August 14, 1868.

"Witnesses thereof—Ann Carter, cook; Mary Coles, housemaid."

On the affidavits of the witnesses, the Court was satisfied that this memorandum was duly executed by the deceased in the presence of the witnesses.

Dr. Tristram moved for administration with the memorandum annexed to be granted to Priscilla Hicks, the widow of the deceased. Although the memorandum merely revokes the will, it is testamentary, and ought to be admitted to probate. He referred to *Brenchley* v. *Still.* (1)

(1) 2 Rob. Ecc. 162.

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IN THE GOODS OF HICKS.

LORD PENZANCE. In the case of *Brenchley* v. *Still* (1), the paper contained these words: "I am desirous to revoke and make void my said will and disposition aforesaid, and to die intestate in order that all my property, both real and personal, may go and devolve upon my heirs and next of kin . . . the same as if I had made no will, and had died utterly intestate." The deceased, therefore, in that case, did express a wish in what way her property should go on her death. In this case the memorandum gives no property, and does not appoint an executor. The applicant has got all she wants because I hold the deceased died intestate, but unless some authority can be given me to the contrary, I must decide that this paper is not entitled to be admitted to probate.

June 8. *Dr. Tristram* referred the Court to the case *In the Goods of Hubbard.* (2)

June 22. LORD PENZANCE. This was a question whether administration should issue of the estate of the deceased with or without a certain paper or memorandum. The statute which regulates the matter is 1 Vict. c. 26, s. 20, which enacts that no will or codicil, or any part thereof shall be revoked otherwise than by another will or codicil executed as thereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereinbefore required to be executed. The language, therefore, implies that a will may be revoked by what is properly a will or codicil, or by something which is neither will nor codicil, but *some writing;* and I have serious doubts whether what is designated *some writing*, and is neither will nor codicil, can properly be the subject of probate. But the tendency of the cases cited is to shew that the Court has not hitherto been strict in this matter. And there are some obvious inconveniences in recording such a paper as this. On the whole, I think the better course will be to order administration to issue with the memorandum annexed. I think the memorandum does something more than merely revoke the will. It will be contrary to the practice to include the revoked will in the probate.

Attorney: *Norcutt.*

(1) 2 Rob. Ecc. 162. (2) Ante, p. 53.

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June 29.

Testamentary Paper called a Codicil—Will not forthcoming—Revocation of Codicil—Independent Testamentary Paper.

The deceased duly executed a will, and subsequently a paper, which purported to be a codicil to his last will and testament. This codicil referred to a bequest not contained in the will, but in a deed of gift executed after the will and before the codicil. On the death of the deceased the will was not forthcoming:—

Held, that as the codicil was not revoked by any of the modes indicated by the statute 1 Vict. c. 26, it remained in full force and effect, and was entitled to be admitted to proof.

EBENEZER BLACK, late of Grindon, in the parish of Norham, Northumberland, farmer, deceased, died on or about the 8th of May, 1868. Amongst others, he duly executed a will bearing date the 14th of February, 1865, and a codicil thereto dated the 1st of October, 1866. On the 25th of May, 1867, the deceased executed in the presence of one witness a deed by which he gave and bequeathed all the property of the stocks, crops, and implements of husbandry on his farm of Fenham Hill to his daughter Anne Jobling, and her children, under the covenants as stated in the lease, for their benefit respectively, his grandson, Thomas Jobling, to have the management of the farm as steward, and to keep regular accounts from year to year, and also to pay all servants' wages, rents, taxes, and cesses from the produce of the farm during the continuance of the lease, and for so doing Thomas Jobling was to have 15*l.* per annum; and after the expiration of the lease the whole of the stock, crops, and implements of husbandry he ordered to be sold and converted into money, and equally divided, share and share alike, amongst his five grandchildren, he having already made a provision in his will in favour of his daughter Anne Jobling, by giving to her an annuity of 100*l.* a year during her life. This document, the deceased, in the same month of May, handed to the defendant, Thomas Henry Jobling, one of the grandchildren. On the 19th of October, 1867, the deceased duly executed a paper to the following effect:—I, Ebenezer Black, farmer, Grindon, parish of Norham and county of Northumberland, having already bequeathed to my five grandchildren, issue of my daughter Anne Jobling, to wit, Mary, Thomas, Jane, William, and Anne Jobling,

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the lease, stock, and profits, with everything relating to the farm of Fenham Hill, they paying all rates, taxes, and whatever charges may come against the said farm of Fenham Hill, in addition to which I now bequeath to each of the above-named children of my daughter Anne, the sum of 300*l.* sterling money, when they attain the age of twenty-one years, out of my capital, to be paid to them individually by my executor.

Signed by the testator as a codicil to his last will and testament, &c. This paper the deceased gave to the defendant, and at the time informed him that it was something for the family independent of the mother. It was kept by the defendant until after the death of the deceased, but the will and codicil were not forthcoming at that period.

The defendant, as a legatee named in the codicil, propounded it, and the plaintiff, James Richardson Black, the heir-at-law and one of the next of kin of the deceased pleaded,—That the paper writing, bearing date the 19th of October, 1867, was not executed in accordance with the provisions of the statute 1 Vict. c. 26, and that if the deceased executed the said testamentary paper, he executed it as a second codicil to his last will and testament, the said will and first codicil bearing date respectively the 14th of February, 1865, and the 11th of October, 1866, and that the said deceased destroyed the said will and first codicil with an intention to revoke the same, and also the said alleged codicil. The defendant, in his replication, denied that the deceased executed the paper propounded as a codicil to his last will and testament, bearing date the 14th of February, 1865, and that the deceased destroyed his will with an intention to revoke the alleged codicil.

Mr. Mitchell, one of the attesting witnesses to the codicil, deposed, that he is the master of the union workhouse at Berwick, that on the 19th of October, 1867, Mr. Black, the deceased, called upon him and told him that he had got a little job for him to do. He said his capital had increased, he had 1500*l.* he wished to leave to the family of his daughter. He had already provided a little for them, having given them a farm and the stock upon it. He told deponent to write a codicil to his will, which deponent did and read it to deceased, who then executed it, and took it away with him in an envelope.

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Dr. Deane, Q.C., and *Pritchard*, appeared for the plaintiff.
Staveley Hill, Q.C., and *Dr. Tristram*, for the defendant.

June 29. LORD PENZANCE. In this case the deceased had executed several wills; but at the time of his death no valid will was found. In the hands of a legatee, however, was a document which purported to be a codicil, and is dated October 19th, 1867. It recites that the deceased had already bequeathed to his grandchildren the lease, stock, and profits, with everything relating to the farm of Fenham Hill, and gives in addition to each of them 300*l.* The question is, whether this paper can be admitted to proof. It speaks of a bequest of a certain farm, which is contained not in any will of the deceased, but in a deed of gift executed by him on the 25th of May, 1867. The general proposition in relation to codicils is, that a codicil stands or falls with the will to which it belongs. This general proposition is subject to certain exceptions, and my first consideration will be what were the exceptions under the old law? The result of my inquiry into this matter is very unsatisfactory. The first case reported is that of *Barrow* v. *Barrow and Others*. (1) The deceased in that case had executed a will and codicil. By the codicil he gave the residue of his property to his wife. He then burnt his will. The Court said "As to the codicil it was clear that by the law of England it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition." And yet, in that case, the codicil only disposed of the residue, and it was not possible to ascertain the extent of the term "residue" without the will. The next case was *Medlycott* v. *Assheton* (2), in which the deceased executed a will and codicil. By the codicil she gave 100*l.* each to two trustees named in her will, and divided some trinkets amongst her family. She afterwards ordered the will to be destroyed, which was done, but she preserved the codicil uncancelled, and it was found in her writing-desk. Sir G. Nicholl said, "A codicil is primâ facie dependent on the will; and the cancellation of the will

(1) 2 Phillim. t. Lee, 335. (2) 2 Add. 229.

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is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of and unconnected with the will, that under the circumstances the codicil has been established though the will has been held invalid. It is a question altogether of intention, consequently the legal presumption in this case may be repelled merely by shewing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption." In *Tagart and Bakewell* v. *Hooper* (1), the codicil was headed, "This is a codicil to my last will, and to be taken as a part thereof." Sir H. Jenner, in pronouncing for its validity, said, "In all the cases referred to, there were circumstances which shewed that the codicils were dependent upon the wills; there is nothing here to shew that the codicil was contingent upon the existence of the will." The Court, therefore, in this case, suggests a presumption contrary to that raised in the other cases; for it decides that, to make the codicil invalid, there must be proof that it was intended to be dependent on the will. The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense any codicil that makes any disposition of property at all, must be considered to be dependent on the will, which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether

(1) 1 Curt. 289.

such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it. But all these cases occurred before the Wills Act. Now the 20th section of that Act is most distinct and positive in its terms. "No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, . . . or by the burning, tearing, or otherwise destroying the same by the testator . . . with the intention of revoking the same." And I should have had no hesitation in holding that the intention of that section was to do away with all these implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first was *Clogstoun* v. *Walcott and Others* (1), in which the only observation bearing on this point, made by Sir H. J. Fust was, "Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law, there must be an intention to destroy." The other was the case of *Grimwood* v. *Cozens and Others* (2), in which Sir C. Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was primâ facie dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question then is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shewn by the party applying for the probate of the codicil alone, that it was intended that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." Now, in reviewing these decisions, I cannot perceive that the effect of the statute has been fully considered by the Court. Sir C. Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as having been so decided; and Sir H. J. Fust dismissed the point without any reasoning whatever, merely affirming that the statute had made it necessary

(1) 5 N. C. 623. (2) 2 Sw. & Tr. 364.

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that there should be an affirmative intention to revoke. But the statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to be admitted to proof.

Attorney for plaintiff: *Adam Burn.*
Attorneys for defendant: *Smith, Fawdon, & Low.*

July 6.

IN THE GOODS OF DAVID JENKINS.

Testamentary Suit—Guardian ad litem—Next of Kin of Minor interested—Citation.

The Court refused to appoint the paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother in reference to the validity of the will of the minor's father, without first citing the mother to shew cause why such an appointment should not be made.

DAVID JENKINS, of Henfaes Llanllwny, Caermarthenshire, died on the 28th of November, 1867, having executed a will bearing date the 26th of November, 1867, in which he appointed his wife, Eliza Jenkins, guardian of his son David Jenkins, and sole executrix. By this will he gave to his wife absolutely the messuage, farm, &c., of Henfaes, in his occupation, and all his personal property. All the residue of his real property he gave to his son David, his heirs and assigns; but to his wife authority and all necessary remedies to receive the rents, issues, and profits of such residue until his son should attain the age of twenty-one years, to and for her own use and benefit, and for the maintenance and education, as she thought proper, of their son. He also gave to her the same powers that he had himself over the real property which he had devised to his son. Mrs. Jenkins proved this will on the 14th of December, 1867, and swore that the personal estate did not amount in value to 450*l.* David Jenkins, the deceased's son and only child, is eight years of age.

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Bayford moved the Court to appoint Mr. John Jenkins, the paternal uncle and presumptive heir-at-law of the minor, his guardian, for the purpose of calling in the probate of the will of the father, and of contesting its validity on his behalf. Information has been given to Mr. John Jenkins, recently, which induced him to conclude that the will is invalid, and he is willing to carry on the suit at his own personal risk as to costs. As the minor is living with his mother he is not in a position to elect an independent guardian. He referred to the practice of the Court of Chancery in such cases: Sidney Smith's Chancery Practice, 7th ed., vol. 1, pp. 271—273.

LORD PENZANCE. This is an application to institute a suit on behalf of a minor, which may turn out to be purely vexatious. Before the Court will allow a stranger to inaugurate such a suit, it will require that a notice shall be given to the widow of the deceased, who, primâ facie, is entitled to represent her son, and who may file affidavits to shew that such a suit would be frivolous. Let a citation issue, calling upon Mrs. Jenkins to shew cause why Mr. John Jenkins should not be appointed guardian to the minor, for the purpose of calling in the probate already granted to her, and of contesting the validity of the will of the deceased.

Proctor: *W. G. Jennings.*

NOBLE *v.* NOBLE AND GODMAN.

June 8

Matrimonial Suit—Decree Nisi—Marriage of Petitioner before Decree Absolute—Adultery—Discretion—20 & 21 *Vict. c.* 85, *s.* 31.

2 P. & M. 26

After a decree nisi in a suit for dissolution of marriage, but before such decree had been made absolute, the petitioner went through a form of marriage, and cohabited, with a female, the Court, being satisfied that he did so in ignorance of the law, and in the bonâ fide belief that his first marriage was finally dissolved, determined that it was a case in which it could exercise the discretion given to it by 20 & 21 Vict. c. 85, s. 31, and made the decree absolute, notwithstanding such adultery of the petitioner.

EDWIN NOBLE, of Ipswich, in the county of Suffolk, tailor, presented a petition to the Court for a dissolution of his marriage with Mary Ann Noble, by reason of her adultery with the co-

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respondent. No appearance was entered in the suit for either the respondent or co-respondent; and on the 28th of November, 1868, the Judge Ordinary made a decree nisi for such dissolution. On the 11th of December, 1868, the petitioner was married by license at the parish church of St. Matthew, Ipswich, to a woman named Rebecca Howes, and afterwards cohabited with her as his wife in Anne Street, Ipswich. In the entry in the register book of marriages Edwin Noble is described as a bachelor. On the 26th of April, 1869, the Queen's Proctor entered an appearance under the direction of the Attorney-General, and filed affidavits in which the above-mentioned facts were established. Mr. Noble, in explanation, also filed an affidavit to the following effect:—"I attended at this Honourable Court on the 28th of November, 1868, when a decree nisi was made in this cause. I conducted this cause in person, not having the means to employ counsel. I understood, by the said decree nisi, that I was then fully divorced from the respondent, and at liberty to marry again. I was not aware I was not fully divorced, and at liberty to marry again, until reading the affidavits filed by the Queen's Proctor in this cause. What I have done (if wrong) is solely from ignorance of the law, and not wilfully or from any other cause. The marriage ceremony stated by the Queen's Proctor to have taken place between me and Rebecca Howes was not done privately or with any view to concealment, but I caused an announcement thereof to appear in two newspapers, printed and circulated at Ipswich and the neighbourhood." It was not alleged that Edwin Noble had cohabited with Rebecca Howes before the celebration of such marriage.

The Attorney-General (*C. A. Middleton* with him), submitted that the facts set out in the affidavits filed by the Queen's Proctor were so material that it was essential they should be brought to the notice of the Court before it made the decree absolute. He referred to *Chichester* v. *Mure.* (1)

Inderwick appeared for Mr. Noble. As the affidavit filed by Mr. Noble has not been met by counter affidavits, the facts therein stated must be taken to be true, and it must be assumed that in marrying again he acted bonâ fide, and in ignorance of the law.

(1) 3 Sw. & Tr. 223.

It is therefore a case in which the Court, under the discretion given to it by s. 31 of 20 & 21 Vict. c. 85, will make the decree absolute, notwithstanding the adultery of the petitioner.

THE JUDGE ORDINARY. In any view of this matter the Queen's Proctor has done a good service by bringing it to the attention of the Court. The petitioner says that he acted as he did from want of knowledge of the true effect of a decree nisi, and I have to determine whether under the circumstances I can exercise my discretion in his favour. The first question is, did he act bonâ fide? Looking at the mode in which the marriage was contracted, I am prepared to give credence to his statement that he believed he had been released by law from his previous wife, and on that account he contracted the second marriage, and committed adultery. It has been said that ignorance of the law is no excuse. That is true, and this petition must have been dismissed, unless the Court had had a discretion given to it. But when the Court has a discretion, the petitioner's ignorance of the law may properly be considered. Now the statute says that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery; in other words, it gives the Court a discretion. In a recent case, *Morgan* v. *Morgan and Porter* (1), I stated that the exercise of such discretion could not depend merely on the more or less pardonable or excusable character of the adultery proved. But where the excuse goes to this, that the party was innocent of an intention to commit adultery at all, the matter is very different. I pointed out certain classes of cases in which I thought the discretion might be fitly exercised in favour of a petitioner, and I further suggested there were probably others, and I think this is one. One case I referred to was that of a wife who gave herself out as being dead, and afterwards came to life again. The husband having sued her for adultery, she retorted the adultery he had been guilty of by marrying again, when he supposed her to be dead. The Court, believing that there was an entire absence of any intention to commit adultery with knowledge of the circumstances, did not withhold a decree. In this case the Court is satisfied that the petitioner acted

(1) Ante, p. 644.

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bonâ fide, and under the circumstances it is of opinion that the adultery ought not to stand in the way of a decree for dissolution of marriage. The decree therefore will be made absolute.

Attorney for petitioner: *W. G. Jennings.*

June 17.

FITZGERALD *v.* FITZGERALD.

Desertion.

2 P.D. 137

No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has ceased to exist, whether by the adverse act of husband and wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed. The refusal by either, of the request of the other, to resume conjugal relations, does not constitute the offence of desertion.

A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. They never afterwards resumed cohabitation, and neither of them took any step for the purpose of bringing about a reconciliation. The conduct of the husband in holding aloof from the wife, and making no demand of cohabitation, was held not to constitute desertion.

THIS was a petition by a wife for a dissolution of marriage on the ground of adultery coupled with desertion. The respondent did not traverse the allegations in the petition, and it was stated that he was quite willing that the petitioner should succeed in obtaining a decree if she could establish her right to it. The cause was heard before the Judge Ordinary on the 27th of November, 1868. The charge of adultery was established, but the Court took time to consider the question of desertion. The material facts are stated in the judgment.

Coleridge, Q.C., H. Giffard, Q.C., and *Dr. Swabey,* were for the petitioner; *Dr. Spinks, Q.C.,* and *Searle,* for the respondent.

Dec. 22, 1868. THE JUDGE ORDINARY. The petitioner in this suit instituted a former suit against her husband a few years since, charging him with adultery and cruelty. She failed to establish these charges. The parties have never lived together since. Her present suit is founded upon charges of adultery and desertion.

Adultery since the conclusion of the former suit has been proved. The question which the Court has reserved for consideration is, whether the desertion is established?

The facts are not doubtful. In the autumn of 1861 Mrs. Fitzgerald received information which led her to believe that her husband had been guilty of adultery. At that time their home was at Braydon Hall, but at the moment when these suspicions were aroused they were both temporarily absent from it—he for a month at Cowes, she for a few days in London. Some attempt was made to establish the proposition that Mr. Fitzgerald, in leaving for his visit to Cowes, had in fact determined not to return to his wife. But his conduct immediately afterwards, and the correspondence which then passed between them, sufficiently disprove any such resolve.

Upon discovery of what Mrs. Fitzgerald deemed proof of her husband's guilt, she wrote him a letter charging him with it, and distinctly refused to return home, at least for the present. She says: "I have received a communication of such a nature, it is impossible for me to return to Braydon for the present. In fact, I am so entirely upset by it that it must be some days before I can recover myself sufficiently to think what to do." After writing this letter, Mrs. Fitzgerald went with her mother to Dover. Thither Major Fitzgerald followed her. It is needless to pass in review the passionate letters which Major Fitzgerald then wrote entreating forgiveness for the past (whatever that was), and that his wife would receive him and live with him again. She refused to see him, and the burthen of her letters was uniform—"Prove yourself innocent, and I will accede to your wishes; until then, I have determined to live separate and apart from you."

The act of separation was therefore that of the wife. She withdrew herself from the common home and cohabitation; and though strenuously pressed to resume it, she persistently refused. Whether she had good cause and reasonable excuse for her conduct is another matter.

True, she failed to establish her husband's guilt to the satisfaction of the jury and the Court. But it is not inconsistent with that to allege, that she had such reasonable grounds for suspecting her husband as to warrant her in withdrawing from cohabita-

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tion until her suspicions were confirmed or dispelled. Believing that she could establish her husband's guilt, she instituted the suit to which I have above referred. The case was brought to trial at Christmas, 1863, and an appeal to the full Court finally established the verdict against her early in the following year. Meanwhile, both parties had kept aloof from each other, as might be expected. After the first few months which immediately succeeded the withdrawal of his wife from Braydon Hall in 1861, Major Fitzgerald, so far as the Court is aware, desisted from all attempts to induce her to return to him.

The termination of the legal proceedings appears to have worked no alteration in the relations of the parties. On her part, Mrs. Fitzgerald made no overtures to her husband to return to him. She says she wrote one letter to him to a wrong address, which was returned through the Dead Letter Office. She says, further, indeed, that she was willing to have returned if he had asked her, and that she was bound to accept the verdict of the jury. But, on being questioned, she could not and did not assert that his innocence was really established to her own satisfaction and belief; and the Court may well hesitate to accept the conclusion that the trial had really removed her scruples or changed her determination, for she has repeated the same charges against him on the face of her present petition. She also alleges, that for some time she did not know her husband's address; but she admitted that she first entertained the idea of reconciliation when she came to town in 1864, and that within a day or two afterwards she found her husband was leading an immoral life, and abandoned the idea again almost as soon as she had conceived it. So that in the result it is quite plain that Mrs. Fitzgerald never demanded to be taken back again by her husband, and I think tolerably plain that she never desired it.

On Major Fitzgerald's part nothing seems to have been done since the first suit towards reconciliation. He has never sought his wife, or asked her society; but, like her, has been well content that the breach made in 1861 should remain open, and cohabitation not resumed. But, does all this amount to "desertion" on his part? That is the question.

Now, putting the facts in the most favourable light for Mrs.

Fitzgerald, it would, I presume, be argued thus. After the first suit was at an end, Major Fitzgerald might, at any time, have demanded cohabitation of his wife; she was not unwilling to return to him; and if she had been, the law would have compelled her; but he made no such demand; therefore he wilfully kept apart from her; therefore he deserted her. If indeed, keeping apart from a wife who has voluntarily quitted her husband against his will, and withdrawn from cohabitation, is the same thing as "deserting" her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists; the word carries with it an idea of forsaking or leaving, and is hardly satisfied by the negative position of standing apart.

No doubt there are cases, such as that of *Williams* v. *Williams* (1), in which actual cohabitation does not exist at all, because the circumstances of the parties do not permit of it. I am not now dealing with such cases. No doubt, again, there are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the calls of everyday life, or the exigencies of public duty, and the husband or wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion. For in truth, in such cases, the state of cohabitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is practically to abandon it. Such were the cases of *Gatehouse* v. *Gatehouse* (2), and *Lawrence* v. *Lawrence*. (3) But they have no analogy with a case in which a wife, who complains of desertion, has herself voluntarily ceased to live with her husband, and an actual separation has already occurred, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse. In this latter case the cohabitation is not merely suspended, but determined by the wife herself, with or without good cause, as the case may be, and with or without a conditional intention on her part of possibly

(1) 3 Sw. & Tr. 547. (2) Law Rep. 1 P. & D. 331.
(3) 2 Sw. & Tr. 575.

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resuming it at some indefinite future day, but still broken up and put an end to. In such a case desertion, if it exist at all, is rather the act of the wife herself than that of the husband.

I come, then, to the following conclusions as applicable to cases of this kind. No one can "desert" who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute "desertion." But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, "desertion," in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause." It results from these considerations, that the petitioner's claim to a dissolution of her marriage must be rejected. She is entitled to a decree of judicial separation.

The petitioner declined to accept a decree of judicial separation, and applied for a rehearing of the cause on the ground that owing to a misunderstanding, all the facts on which she relied as constituting desertion had not been laid before the Court. A rehearing was granted on that ground, but the Court directed the Queen's Proctor to intervene, in order that all the witnesses might be called who could give any material information as to the circumstances of the separation between the petitioner and the respondent. The Queen's Proctor intervened accordingly, and alleged collusion, and traversed the allegation of desertion. The petitioner and respondent denied the charge of collusion, and at the hearing that charge was withdrawn. The case was heard before the Judge Ordinary on the 17th of June, 1869.

Sir J. D. Coleridge, S.G., H. Giffard, Q.C., and *Dr. Swabey*,

for the petitioner; *Searle*, for the respondent; *Sir R. G. Collier, A. G., Dr. Spinks, Q.C.*, and *Archibald* for the Queen's Proctor.

The petitioner, and her mother and father, and several other witnesses, were examined on behalf of the petitioner, and evidence was also produced on behalf of the Queen's Proctor.

THE JUDGE ORDINARY. The only question now before the Court is whether Major Fitzgerald can be said to have deserted his wife for two years and upwards, before 1867, when the present petition was filed. I have had some difficulty in understanding how it is intended to put the case on behalf of the petitioner. If it is intended to argue that Major Fitzgerald having committed adultery, or having given his wife reason to believe that he had committed adultery in 1861, and Mrs. Fitzgerald having left him by reason of evidence of such adultery having come to her knowledge, he has been guilty of desertion because he never cleared up to her satisfaction the circumstances which appeared suspicious and wrong to her; the proposition is one that cannot be maintained for a moment. It may be that he had committed adultery, and to say that, because he could not satisfy her that he had not, he must therefore be considered guilty not only of adultery but also of desertion, is an untenable proposition.

But reliance is now mainly placed upon what occurred at the time of the separation in 1861. As regards what occurred after 1861, I have already expressed my opinion in my former judgment.

There is no doubt that in August, 1861, Major and Mrs. Fitzgerald were living together at Braydon Hall, and that Major Fitzgerald in that month went to Cowes. It is equally clear that while he was at Cowes, Mrs. Fitzgerald went to town, and in the course of her conversation with a medical man she learnt facts from which she presumed that he had committed adultery. She wrote him a note on the same day saying that she could not live with him again, and she went to her parents at Dover. Major Fitzgerald followed her there, and there is no doubt that at that time and during a few following months, he was continually entreating her to forgive him and take him back, which she refused. Whether she refused absolutely, or on the condition that he should

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satisfy her of his innocence of the charge, is immaterial, because the condition was never fulfilled, and up to the present time he never has convinced her of his innocence.

But it is now said that when he went to Cowes he left her with the intention of never returning to her; that he had on former occasions formed and expressed an intention of leaving her and taking up his residence at Ryde; and that the parting was intended by him to be final. It is very odd, if that were so, that he should be in a state of such extreme distress as was proved by the medical man when he found that his wife had gone away from Braydon. It is material to consider the evidence which Mrs. Fitzgerald gave in the first suit, before the question of desertion had arisen, upon this point. She then stated that he went to Cowes for his amusement, and that she did not in the least object to his going. Major Fitzgerald gave a similar account, and said that while he was at Cowes they were frequently corresponding, and were on the most affectionate terms.

The evidence which Mrs. Fitzgerald has given on the present occasion does not substantially differ from her original account, and certainly falls far short of establishing that Major Fitzgerald intended his visit to Cowes as a final parting. Taking her own account, if there were no other facts in the case, the Court could not come to the conclusion that Major Fitzgerald at that moment meant to desert her. There are other facts equally strong. The correspondence which was kept up between them, in the course of which she gave him a commission to purchase a dress for her, and enclosed him a cheque to pay for it, is inconsistent with the notion of desertion. In his letters he speaks of servants and other household affairs in a manner which it is quite impossible to reconcile with an intention to abandon his home. In my judgment, therefore, the proposition that he deserted her when he went to Cowes cannot be maintained. The further evidence as to what has happened since, which is now before the Court, confirms me in the opinion I expressed in my first judgment, and tends very strongly to show that Mrs. Fitzgerald never really wished her husband to live with her again after the separation in 1861. One witness states that she refused to entertain the notion of living with him again, as late as 1865, less than two years before the petition was

presented. To these facts it must be added that she never by word of mouth, by the intervention of third persons, or by letter, asked him to take her back to cohabitation.

Mrs. Fitzgerald is entitled to a judicial separation on the ground of adultery, but not to a decree of dissolution.

Attorneys for petitioner: *Humphreys & Morgan.*
Attorney for respondent: *Freshfields.*
The Queen's Proctor.

MUMBY *v.* MUMBY. *July 6.*

Matrimonial Suit—Petition for Alimony—No Answer by Respondent—Proof by Affidavit—Practice.

The Court allowed the income of the respondent, who had not filed any answer to his wife's petition for alimony, to be proved by affidavits; but required that notice should be given to the respondent of the filing of the affidavits, and of the wife's intention to apply for alimony upon the income proved therein.

MARTHA MUMBY petitioned the Court for a judicial separation by reason of the cruelty of the respondent, John Godfrey Mumby. On the 17th of February, 1869, she filed a petition for alimony pendente lite, in which she set out that her husband was the owner of a house and shop in Marine Row, Great Passage Street, Kingston-on-Hull, Yorkshire, for which he had paid 520*l.* That he carried on the business of a quack doctor in the same place, by which he had made a yearly income of 250*l.*; and that he had considerable sums of money to his credit at a bank in that town. To this petition the respondent filed no answer.

Dr. Swabey asked the Court to allow the petition for alimony to be proved by affidavits. The respondent has not appeared in the suit at all, and considerable expense will be incurred if witnesses are to be brought from Yorkshire to prove his income vivâ voce in this Court.

THE JUDGE ORDINARY. In order to save expense, I will allow the income of the respondent to be proved by affidavits. But as under Rule 89 (Rules and Orders, 1865) the husband is entitled to

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receive notice of an intention to examine witnesses, although he has not filed an answer; so, I think, in this case the petitioner should give notice to the respondent of the fact that her affidavits are filed in the registry, and that she intends to apply to the Court for alimony on the income therein proved.

Attorney: *J. Yarde.*

Jan. 20.

MORPHETT *v.* MORPHETT.

Cruelty—Communication of Disease—Evidence—New Trial.

In support of a charge of cruelty, evidence was given that the wife was infected with disease, and that she had not been unchaste before marriage or unfaithful after it; but there was no evidence, beyond the presumption arising from the state of the wife, that the husband had ever suffered from the disease. The husband positively denied that he ever was diseased. The jury found that the husband was guilty of cruelty:—

Held, by the full Court (Willes, J., dissenting), that there was not sufficient evidence to support the verdict; and a rule was made absolute for a new trial on payment of costs.

THIS was a petition by a husband for restitution of conjugal rights.

The respondent in her answer, charged the petitioner with adultery and cruelty, and prayed for a judicial separation. These charges were denied by the petitioner, and the cause was heard before the Judge Ordinary by a special jury. The only evidence produced in support of the charges in the petition was to the effect that the petitioner had communicated an infectious disease to the respondent, and the petitioner denied that he had ever suffered from the disease. The jury found that the petitioner was not guilty of adultery and that he was guilty of cruelty. A rule nisi for a new trial was obtained by the petitioner, and the rule was argued on the 19th of November, 1868, before the full Court. (1)

Parry, Serjt., *Dr. Tristram*, and *Lush*, were for the petitioner.

Coleridge, Q.C., *Dr. Spinks, Q.C.*, and *A. S. Hill*, were for the respondent.

Cur. adv. vult.

(1) The Judge Ordinary, Willes, J., and Cleasby, B.

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Jan. 20. THE JUDGE ORDINARY. The parties in this case were married on the 9th of June, 1866. They lived together only a few months. At the end of that time the respondent refused to live with her husband any longer. The ground of her then refusal was his unkind and cruel conduct. This was investigated at the trial, but nothing like legal cruelty was proved.

In the month of January, 1867, the husband filed the petition in this case for a restitution of conjugal rights. In the month of February, 1867, the respondent was examined by a surgeon of eminence, who found her to be affected with certain tubercles and other symptoms, which indicated to him that she was suffering from secondary syphilis, which, in his opinion, she had suffered from on some previous occasion. This, the respondent said, was the first intimation she ever had of being thus affected. In the next month a child was born, similarly affected, and the existence of this disease was beyond question.

Upon this, she filed her answer to her husband's petition, and charged him with having wilfully infected her. He denied it, and submitted himself immediately to examination by medical men, who swore that there was then no trace of such a disease; and, further, gave their opinion that, if he had been diseased in the previous autumn, there must have been some such trace left.

On the other hand, the respondent swore that she had not been unchaste before marriage, or unfaithful after it. No proof was given, beyond this denial, on the part of the wife, to establish the fact of the husband having been the cause of the infection. It was, indeed, sworn by her, though denied by him, that during the cohabitation, when she consulted him about a discharge from which she suffered, he advised her not to mention it to her mother. But the medical man who attended her within a month of her marriage, proved that the discharge she suffered from was, probably, of an innocent character; at any rate, that it had no connection with syphilis; and her own admissions made it probable that it was due to nothing but an innocent complaint from which she had suffered before marriage.

In this state of things, the jury, with nothing to guide them but the oaths and demeanour of the two parties themselves, decided, as

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might be expected, in favour of the wife, and arrived at the conclusion that the disease proceeded from the husband.

But the mere fact that a husband has communicated disease to his wife, whatever may be thought of it in other points of view, is not sufficient to constitute legal cruelty. It is abundantly clear that, for this purpose, the act must be a wilful one; and, according to the judgment of Dr. Lushington in *Collett* v. *Collett* (1), the proof of it "requires very strong and conclusive evidence." The very important question, therefore, arises whether, in the mere fact that the wife was diseased, any evidence is to be found to sustain the proposition, not only that the husband infected her, but that he did so *knowingly* and *wilfully*. It devolved upon the respondent to establish affirmatively that the petitioner, having the disease himself, knew, either from medical advice, or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that connection with his wife was at least distinctly dangerous.

The great difficulty attending the establishment of these propositions in this case was this—that no proof appears to have existed of the actual fact of disease in the petitioner at all; and, consequently, none of the form in which it presented itself. On the other hand, the presumption that the petitioner had the disease, which was drawn from the respondent's oath that she had not been herself unchaste, did not carry with it any further presumption as to the form in which the petitioner had it, or the symptoms by which it was attended at the time when he is supposed to have communicated the infection.

Now, it is obvious enough that in such an inquiry as the present it is all-important to know what the signs of the disease were *at that time*. Were they such as to give warning, or at any rate arouse suspicion and excite vigilance and inquiry? Were they such that any man might be expected to notice them and suspect their true nature? If knowledge is charged and the proof of it is to be drawn from the fact that the disease existed, it is material to know whether the disease existed in such a form as to carry with it a knowledge of its existence and an appreciation of its nature and incidents.

(1) 1 Curt. 678, 679.

In many, if not most, cases of venereal disease, the general nature of the malady is hardly doubtful. I allude to those cases in which the organs of generation are palpably affected. But when the disease exhibits itself in other parts of the body only, as was proved to be the case with secondary syphilis, and the symptoms are those of eruption, sore throat, and the like,—easily disregarded, with innocence, or as easily referred, with innocence, to other causes,—the case becomes widely different. Now, it is just here that the evidence of fact wholly fails. There is an absolute dearth of proof that the petitioner was diseased at all, and, consequently, of all circumstances tending to shew its character or appearances.

The next question is, whether the scientific evidence supplies this defect. I am quite unable to perceive that it does. Proof of this character ought, I conceive, to be tolerably uniform and cogent to the end it is designed to meet. It is far from it. There is no affirmative medical testimony from which it can be inferred whether the symptoms of the petitioner at the time of the supposed infection must have been those of secondary syphilis; or, indeed, whether at that time he must have had any outward symptoms at all. If primary, it is probable, on the evidence, that the symptoms would be such as to challenge attention and reveal their true character. But, if secondary, it was made clear by the evidence, beyond question, that they might escape observation altogether, or, if noticed, might be innocently referred to other causes than venereal disease. In a word, no definite conclusion was capable of being drawn from the evidence given at the trial through the medium of medical experience, as to the form in which the person who infected the respondent must himself have been suffering at the time. When I say *must*, I mean must within the limits of all reasonable probability, as inferred from past experience. It was, I think, absolutely incumbent upon the respondent, in the absence of actual proof on this head, to lay the foundation for a scientific conclusion which should take its place, and from which the jury could argue with reason, first, to the charge of knowledge, and, through that, to the charge of wilfulness. It was part, and the most essential part, of the burden of proof which her charge of cruelty cast upon her; and the defect in its proof leaves her

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case, in my judgment, unsupported by sufficient evidence to sustain the finding of the jury.

The rule for a new trial ought, therefore, in my opinion to be made absolute. But before the petitioner brings the case to trial again, I think he ought to pay his wife's costs of the first trial. The principle acted upon in this Court is, that the husband should provide the wife with the means of defending herself; and as the finding of the jury exonerated the respondent from all misconduct, the petitioner ought not to enter upon further litigation until provision has been made for her costs of the past.

WILLES, J. If the question in this case had retained the form in which it was dealt with at the trial; in the rule; and, as I understood, upon the argument; as one of fact depending only upon the weight of evidence, I might have restricted myself to expressing a strong reluctance against condemning the respondent, who is upon her defence, to the ordeal of a new trial in such a case, once fully investigated, properly laid before a jury, and deliberately decided by them.

Inasmuch, however, as the true question has, in the event, turned out to be one of law, viz., whether there was any sufficient evidence to go to the jury, and the majority of the Court are of opinion that there was not, their judgment, in which I do not concur, involves not merely a new inquiry, but practically a decision of the cause, and a conclusion, only to be deferred by the charges and chances of litigation, that the respondent must return to cohabit with the petitioner; and it is therefore right that I should shortly state my reason for dissenting.

Having carefully studied the short-hand writers' notes of the trial, I find evidence of the following facts:—

The marriage took place in June. Soon after the wife suffered, amongst other things, from a discharge which according to her evidence was distinctly unlike any that she had experienced before. It was remarkable enough to induce her to complain of it to her husband, and he requested her not to tell her mother, as people would think that something was the matter with one or other of them. The husband left his wife in the beginning of September, and they did not again cohabit.

During the cohabitation she had caught a foul disease, the precise nature of which was not suspected by her medical attendant before November, and was not discovered until her examination by a more experienced medical man early in the following year. In the following March she was prematurely delivered of a child poisoned thereby.

How did she contract the disease? Not by any misconduct of her own. No suggestion of that was made against her at the trial. The evidence was such that my Lord in summing up told the jury they would have "scouted" the notion if suggested. Had any such imputation been made, she might have ransacked her life for evidence to rebut it. And to be influenced by the hint of its possibility, thrown out in argument, would be grave injustice.

Could the disease then have been congenital? Of this there was no evidence either as to the husband or wife, and on the contrary strong improbability, such as a jury were warranted in acting upon.

It remains, as the jury concluded, that she had caught it from her husband, and that he had at some time contracted the disease.

But in order to entitle her to object to a renewal of cohabitation, it was still to be shewn that he must have known of, or at least suspected, his state and disregarded the probable consequences to his wife. As to the proof of this, I conceive that in the present state of the law, allowing the examination of the parties, explanation from the husband was properly called for at the trial, and, in the absence of any satisfactory explanation, the jury were justified in acting upon the evidence given by and for the wife.

The case or cases in the spiritual courts, which shew, or tend to shew, that a husband might disease his wife over and over, and yet compel her to return, unless she could establish affirmatively that he not only was diseased and diseased her, but knew of his state when he did so, could only be tolerable under a system which excluded the evidence of the husband. Now that he can be heard if he thinks proper in explanation, those cases are only valuable as warnings.

What, then, was the answer or explanation given or attempted by the husband? It consisted in the main of proof, first, that he was examined by medical men, who found no traces of disease, at a

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period consistent with the fact of his having suffered from it during the cohabitation and recovered; and, secondly, of his own evidence contradicting that of the wife in several particulars, and positively denying that he ever had the disease.

In this state of things I do not pretend to pronounce an opinion upon the question of fact, which is not within my province, but I am satisfied that it was competent for the jury to believe as they did the statements of the wife; to conclude that the husband was the cause of the suffering; and that his denial of having ever suffered himself was untrue, and therefore unsatisfactory.

A man who commits an act primâ facie injurious to another, which may or may not be morally wrong according to the mind with which it was committed, and who having the opportunity of explanation offers none beyond a flat contradiction, exposes himself, when the fact is established by competent proof, to the inference that his lying denial was the result of conscious wrong.

Whether that inference be a just one under the circumstances is a question for a jury. I do not understand how it can be held otherwise than relevant and important, without also holding that there was nothing in the wife's evidence which the husband ought to have been called upon to answer.

In the result, I think there was evidence from which the jury might properly conclude: first, that the disease was communicated to the wife by the husband, under circumstances calling upon him for an explanation; and, secondly, that the explanation attempted was untrue, and ought to be rejected; except, indeed, so far as the assertion of a falsehood gives rise to the inference of guilty motives for keeping back the truth.

Upon these grounds I am of opinion that the rule for a new trial ought to be discharged.

CLEASBY, B., concurred with the Judge Ordinary.

Rule absolute on payment of costs.

Attorneys for petitioner: *Hillearys & Tunstall.*
Attorneys for respondent: *Sharp & Ullithorne.*

HAIGH *v.* HAIGH.

1869
March 16.

Permanent Alimony—Settled Property belonging to Wife—Rate of Allowance—Judicial Separation—20 & 21 Vict. c. 85, s. 22.

The Court is bound by the practice of the Ecclesiastical Courts in allotting permanent alimony after a decree of judicial separation. According to the practice of the Ecclesiastical Courts, the Court is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement.

THE wife had obtained a decree of judicial separation on the ground of cruelty, and the case now came before the Court on the question of permanent alimony.

The entire income of the respondent was derived from property comprised in a marriage settlement, part of which was brought into settlement by the wife, and part by the husband. By the settlement the income of the whole of the property was receivable by the husband during their joint lives.

The question of the amount of income was referred to the registrar, who reported that the respondent's income was 341*l.* per annum, of which 210*l.* was derived from property formerly belonging to the petitioner.

Dr. Deane, Q.C., and *Searle*, for the petitioner, moved that the income of the whole of the wife's property might be allotted to her as permanent alimony. The Court is not bound by the practice of the Ecclesiastical Courts, which is inapplicable in many respects to the cases which now come before it; but it is at liberty to make such allotment as it may deem just. There is no reason why it should not exercise the same discretion in suits for judicial separation as in suits for dissolution.

Dr. Tristram, for the respondent. There is no reason why the Court should depart from the usual rate of one-third of the joint income. But the Court is bound by the rules of the Ecclesiastical Courts in suits for judicial separation (20 & 21 Vict. c. 85, s. 22), and according to those rules one moiety is the utmost that it is at liberty to allot: *Cooke* v. *Cooke*. (1)

(1) 2 Phillim. 40.

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THE JUDGE ORDINARY. The question is on what principle the Court is to act in allotting permanent alimony in suits for judicial separation. The Court is invited to adopt, by analogy, the principle on which it acts in suits for dissolution; but the powers given to the Court in suits for dissolution are defined by certain sections of the statute, and the legislature has advisedly not extended the powers contained in these sections to suits for judicial separation. The 22nd section of the statute defines the principles and rules by which the Court is to be guided in suits for judicial separation; namely, "the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief." I should have thought it very equitable to say that, where a wife has brought a sum of money, large or small, to the husband, and the cohabitation contemplated at the time of the marriage has become impossible by reason of the husband's misconduct, she should receive back the money which she had brought to the common fund. That, at any rate, would have been an intelligible principle. But the Ecclesiastical Courts never proceeded on any such principle; there is no trace of it in the reports. The rule laid down by those Courts was to take all the circumstances of the case into consideration, and, having regard to those circumstances, to allot a certain proportion of the joint income. The highest proportion ever allotted in any case was one moiety, and that is the highest that I am at liberty to allot. Taking the joint income at 340*l.*, I allot 170*l.*, payable quarterly.

Solicitors for petitioner: *Torr, Janeway, & Taggart.*
Proctor for respondent: *Brooks.*

GRAHAM *v.* GRAHAM AND GRIFFITH. 1869

April 22.

Marriage Settlements—Issue—22 & 23 Vict. c. 61, s. 5.

The Court has no power to deal with marriage settlements under 22 & 23 Vict. c. 61, s. 5, unless there is issue of the marriage living at the date of the order, although there may have been such issue living at the date of the decree of dissolution.

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A DECREE dissolving the marriage was pronounced on the 8th of May, 1861. At that time there was living issue of the marriage one child, who died on the 6th of June, 1867. On the 19th of February, 1869, the petitioner filed a petition under the 5th section of 22 & 23 Vict. c. 61, praying for an inquiry into the execution of an ante-nuptial settlement, and for an order with reference to the application of the property settled thereby.

Searle, for the respondent, moved that the petition might be dismissed, on the authority of *Corrance* v. *Corrance*. (1)

Stavely Hill, Q.C., and *R. Blaine*, for the petitioner. The words "either for the benefit of the children of the marriage or of their respective parents," are words descriptive of the property with which the Court is empowered to deal, not limiting the power of the Court as to the orders which it has to make.

[THE JUDGE ORDINARY. Then it would follow that the Court might make what orders it pleased with regard to the property, and give it not only to the parents or the children, but to any one else, without a restriction of any kind.]

That was the intention of the legislature, and such a construction would get rid of the difficulties felt in *Corrance* v. *Corrance* (1), and the previous cases, as to the meaning of the section.

THE JUDGE ORDINARY. I repeat what I said in *Corrance* v. *Corrance* (1), that I much lament that the Court is not invested with full power of dealing with marriage settlements, whether there is issue of the marriage or not. I very much doubt whether, when the statute was passed, attention was directed to the legal effect of the language used in the section; but it is needless to

(1) Ante, p. 495.

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indulge in that speculation, for the Court is bound by that language and its proper legal interpretation. That language has received the interpretation of the Court in three cases: in *Thomas* v. *Thomas* (1), in which the full Court were unanimous; in *Bird* v. *Bird* (2), where I followed the decision in *Thomas* v. *Thomas* (1); and in *Corrance* v. *Corrance*. (3) In the last case the full Court, upholding *Thomas* v. *Thomas* (1), held further, that the circumstance that there had been a child which was not living at the date of the divorce made no difference. And the Court had this alternative—either it must have decided that it had power under the section, whether there was issue of the marriage or not, or that it only had power where there was a child existing, who might be benefited by the order of the Court. That was the only reasonable interpretation of the language of the legislature. It seems to me that it would be unreasonable to hold that the legislature intended the Court to have the power of opening settlements if there ever were children of the marriage, although none were living at the time of the order, but that it did not intend it to have that power if there were never any children. The Court had no alternative but to come to the conclusion to which it came in *Corrance* v. *Corrance*. (3) That decision governs this case. The only difference between them is, that there the child died before the decree absolute, and here it died after the decree. A new view of the structure of the section has been presented to the Court, and it has been suggested that the words "for the benefit" must be coupled with the word "settled," and disconnected with the words "may make such orders." The result of that construction would be that the Court would have power to make orders in favour of anybody, and to invest it with an enormous and unreasonable power over settled property. I cannot acquiesce in the suggested construction, and I dismiss the petition with costs.

Solicitor for petitioner: *A. Chandler.*
Solicitor for respondent: *W. Raimondi.*

(1) 2 Sw. & Tr. 89. (2) Ante, p. 231.
(3) Ante, p. 495.

BUCKMASTER *v.* BUCKMASTER.

1869
June 29.

Desertion.

A husband, having refused to cohabit with his wife, or to provide a home for her, offered her 100*l.* on condition that she would not molest him in future by insisting on her conjugal rights. She agreed to the condition, and received the money, and they never afterwards cohabited. The Court held that these facts did not constitute desertion on the part of the husband.

2 P. M. 30
3 P. M. 203

THIS was a petition by a wife for dissolution of marriage on the ground of adultery, coupled with desertion. The respondent did not appear, and the cause came on for hearing before the Judge Ordinary on the 11th of June.

June 11. *Inderwick*, for the petitioner.

The respondent was a miller residing with his father and mother at Doolittle Mill, Tottenhoe, in the county of Bedford. In the years 1860 and 1861 the petitioner was a domestic servant in the service of the respondent's brother-in-law, Mr. Chambers, at Dunstable. In November, 1861, the petitioner accompanied the respondent to London, and after living together in lodgings for a fortnight they were married on the 28th of November, 1861, at St. Marylebone Church. The marriage was without the knowledge of the respondent's parents. The petitioner and respondent never cohabited after it was celebrated, but on the same day they returned to Bedfordshire, and the petitioner went to her sister's house, and the respondent to his parents. When the marriage came to the knowledge of his parents they refused to sanction it, and would not allow the petitioner to remain at the mill with the respondent, who was dependent upon them. The petitioner's friends interfered, and the respondent's father at last consented to give her 100*l.* on condition that she would not molest her husband, or insist upon living with him. She accepted the money, and signed an undertaking to that effect. In April, 1862, the petitioner instructed her solicitor to institute a suit for restitution of conjugal rights against the respondent, as he had declined to make any provision for her maintenance, or to find her a home; but the respondent went to Australia, and the petition was never served on him, and the proceedings dropped. He afterwards returned to England, and in December, 1866, he paid the

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bill of costs of the proceedings in the restitution suit. It was proved that for many years past he had been living in adultery with a woman at his parents' residence.

Cur. adv. vult.

June 29. THE JUDGE ORDINARY. In this case the adultery was proved, and I took time to consider the question of desertion. It appeared that the marriage was unknown to the family of the husband; that the parties came together from Bedfordshire, where they were then living, to London, where they were married; that they went back to Bedfordshire immediately after the marriage, the husband going to his home, and the wife going to her own family; and that there was never any cohabitation between them. Her account of what occurred is this: "We returned the same day. He went to his own home, and I went to mine. He was to get his parents' consent, and to find a home for me. I went to the mill on the Sunday morning. He said he would find a home for me when he had got one. I saw Mr. Chambers, and asked his advice. He saw the respondent's parents. The result was that I should take 100*l.* not to molest him any more."

Thus within two months after the marriage the whole matter was arranged by her receiving 100*l.*, and she says "the understanding was that I was to take the 100*l.*, and not to molest him any more." The solicitor was called who acted for her, and he stated that there was an agreement that, in consideration of the 100*l.*, the petitioner should abstain from molesting her husband by insisting on her right to live with him.

The result of the evidence is this:—The husband did not cohabit with the wife, and did not offer her a home. She began by insisting on her rights, but in a short time she resigned them in consideration of 100*l.*, and they have never lived together since. That does not constitute desertion according to the principles which I have endeavoured to lay down in previous cases. The wife chose to bargain that they should not live together, and unless they cohabited after that bargain there could be no desertion.

The petitioner is therefore entitled to a judicial separation on the ground of adultery, but not to a decree of dissolution.

Attorneys: *Tathams, Curling, & Walls.*

MILFORD *v.* MILFORD.

1869
July 19.

Judicial Separation—Custody of Children—Maintenance—22 & 23 Vict. c. 61, s. 4.

The petitioner having obtained a judicial separation from her husband by reason of his adultery, and also the custody of their two children until the Court should otherwise direct, presented a further petition praying the Court to order the respondent to pay to her a sum or sums of money for the past and future maintenance of the children. The respondent, in answer, asked the Court to order the children to be delivered up to his father and sister, who were quite prepared at their own costs to provide for the maintenance and education of them. The Court refused to take the children out of the custody of their mother, and made an order upon the respondent to contribute in a moderate extent to their maintenance.

Mrs. Emma Bowles Milford, on the 24th of February, 1866, petitioned the Court for Divorce for a dissolution of her marriage with Alfred Milford, by reason of his adultery coupled with cruelty. The petition was heard by the Judge Ordinary without a jury on the 23rd and 24th of November, 1866, and on the 18th of December the Court made a decree of judicial separation only by reason of the adultery of Mr. Milford, holding that no acts of legal cruelty had been proved, and ordered that the children of the marriage, namely, Emma Constance Alice Milford, born on the 24th of October, 1856, and Kathleen Gertrude Milford, born on the 28th of October, 1858, should remain in the custody of the petitioner until further orders. (1) From this decree Mrs. Milford appealed to the House of Lords, and on the 24th of June, 1868, her appeal was dismissed with costs. On the 3rd of December, 1868, she presented a petition for permanent alimony (no alimony having been allotted pendente lite), and on the 24th of March, 1869, a further petition under 22 & 23 Vict. c. 61, s. 4, praying the Court to order the respondent to pay to her such sum or sums of money for the past and future maintenance of the children as to the Court should seem meet. In answer to the last-mentioned petition Mr. Milford alleged that his father John Milford, and his sister Sarah Elizabeth Milford, had always taken great interest in the children, and that, having ample means, they were ready and willing, providing they had full control of the children, to provide for their

(1) Ante, p. 295.

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maintenance and education by engaging professors and governesses, and by educating them and fitting them for the station in life they will in future occupy. That the residence of his father was only half an hour's journey by railway from the sea, and afforded ample opportunity for the children to have frequent sea bathing, and that they would have the benefit of a carriage to ride in and every comfort, and that the tenderest and most watchful care would be taken of them by his father and sister. That it would therefore be greatly to the advantage of the children to place them under the care of his father and sister, and he prayed the Court to reject the prayer of Mrs. Milford's petition, and to order that Mr. Milford his father, and Miss Milford his sister, should have the custody of the children. In support of this answer, Mr. Milford the elder and his daughter made affidavits to the effect that they were ready and willing to receive the children, and to provide for their maintenance and education. The registrar, to whom the petitions were referred, reported that it had been agreed between the parties that Mr. Milford's income amounts to 550*l.* per annum, and Mrs. Milford's separate income to 248*l.* per annum; that Mr. Milford will be entitled, on the death of his father, to the interest for life of one-sixth of the father's residuary estate, and Mrs. Milford, on the death of her mother, now seventy-seven years of age, to the dividends on 2600*l.* Three per Cent. Consols.

Dr. Spinks, Q.C., and *Dr. Tristram*, appeared for Mrs. Milford. The Court will not remove the children from the custody of the mother to place them in the house of Mr. Milford, senior, with whom, in fact, the respondent is living. The Court made an order for maintenance in the case of *Whieldon* v. *Whieldon.* (1)

Dr. Deane, Q.C., and *Searle*, for the respondent. The Court will not consider the merits or demerits of the parties, but the interest of the children, which will best be consulted in this case by placing them in the custody of their grandfather. It is a novelty for the wife, having elected to keep the children, to ask the Court to make an order upon her husband for their maintenance. They referred to *Marsh* v. *Marsh* (2); *Boynton* v. *Boynton.* (3)

(1) 2 Sw. & Tr. 388; 30 L. J. (P. M. & D.) 174.

(2) 1 Sw. & Tr. 312.

(3) 2 Sw. & Tr. 275; 30 L. J. (P. M. & D.) 156.

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THE JUDGE ORDINARY. I am clear that I cannot take the children from their mother in order to hand them over to the father's family. The wife has been wholly blameless in this matter, and has done nothing to forfeit her natural right to have possession of her children, whilst the husband has been proved to have led a life of profligacy at Exeter, by reason of which she has obtained a judicial separation from him. As to the children, therefore, the Court will make no order in favour of the party by whose fault the common home has been broken up, and they have been deprived of the control of their parents. The Court will never place the control of these children, who are girls, in the hands of such a man. If, then, the children are to remain with their mother, the next question is, whether the husband ought to contribute towards their maintenance? Looking to the fact that he has disqualified himself by his conduct from claiming any control over them, and having regard to the incomes of the respective parties, I think he ought to do so. The joint income is 798*l.*, one-third of which will be 266*l.*, of which the wife's separate property amounts to 248*l.* per annum. In addition to 18*l.* payable by the respondent as alimony, I shall order him to pay 30*l.* per annum towards the maintenance of the two children, the payment to commence from the date of the decree of judicial separation.

Attorneys for petitioner: *Shepheard & Son.*
Attorneys for respondent: *Harrison, Beal & Harrison.*

IN THE GOODS OF JOHN SMITH.

July 27.

Testamentary Paper; Conditional—Validity dependent upon the option of an Individual.

The testator wrote a codicil with his own hand, which concluded as follows:—"I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary":—

Held, that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate.

JOHN SMITH died on the 3rd of June, 1869, having made his will bearing date the 24th of August, 1844, and a codicil dated

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the 21st of February, 1860. By the will he left his personal estate to his wife, and also all rents, arrears of rent and profits due and to become due from his real estate, until a son attained the age of twenty-five years, which happened in his lifetime, and in that event he bequeathed his real estate absolutely to the son. He appointed his wife sole executrix. On the 15th of May, 1867, the testator with his own hand drew out and executed in the presence of witnesses a paper writing to the following effect:—"And, furthermore, I make this second codicil to my will and testament of the 24th day of August, 1844, by which I give to my wife the power to receive the rents, profits, and tithes of my estate, situate in the parishes of, &c., till such time that my son marries with her consent, and employ them, or any surplus thereof, to pay off any debts or charges left upon my estate. And I give my wife the option of adding this codicil to my will or not as she may think proper or necessary. In witness whereof I have hereto set my hand and seal this 13th day of May, 1867." The testator's widow and sole executrix filed an affidavit, in which she stated that in pursuance of the option given to her by the paper writing of the 15th of May, 1867, she had decided not to add the same to the testator's will, or to avail herself of the powers intended to be thereby given to her, and that she was desirous that probate should be granted to her of the will and first codicil only.

Dr. Spinks, Q.C., moved the Court to decree probate of the will and first codicil only. The validity of the paper called a second codicil is contingent on the assent of the wife after the death of the testator. The wife, however, dissents, although it is contrary to her interest to do so. The only analogous case is that of a married woman who makes a will without a power authorizing her to do so; her will will be valid or invalid according to the assent or dissent of the husband after her death.

LORD PENZANCE. The codicil in question contains this clause:—"I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." Now the proposition is clear that, the mere fact that a paper is in the form of a will, will not necessarily shew that it is testamentary. There must have been in the execution of it an animus testandi; the testator must

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have intended that the paper shall operate as a will. There have been cases in which persons have signed and executed with the formalities required by law papers in all outward respects wills, but which, it has afterwards been proved to the satisfaction of the Court, were executed in joke or for some collateral object. What the testator has tried to do in this case is, he has endeavoured to leave it to his wife to say whether or no this testamentary paper shall be operative or not. He has declared it to be operative or not according to a certain event, namely, his wife's determination. The Court will be anxious to carry out his wishes, if it be able to do so within the provisions of the law; and the question is, whether the object of the testator is illegal. I think not. It is true that a testator cannot confide to another the right to make a will for him, and it is equally true that he cannot leave to another a power to revoke his will after his death, because the statute says that wills shall be revoked only in the manner prescribed by it, and if a will be destroyed by some person other than the testator, it must be destroyed in the presence of the testator, and by his direction, but there is nothing in the statute to prevent a man from saying that the question whether a paper shall be operative or otherwise shall depend upon an event to happen after his death. Neither common sense nor the words of the statute are opposed to such a proposition. In *Parsons* v. *Lanoe* (1), Lord Chancellor Hardwicke said: "It has been argued that although the dispositions might be made conditional and contingent, yet it was impossible to make the instrument so. If the entire disposition is made so, the consequence will be the same; but though it be truly said that in the several chapters of Swinburne of conditions, there is no instance of the instrument of the will being made eventual, I am very clear, without the help of an authority, that a will or codicil may be entirely depending on a contingency, so as to have no effect as an instrument, unless that event happened, nor should it be proved in the Ecclesiastical Court." I think the intention of the testator in this case was lawful, and as his wife has exercised her option by refusing to recognize the second codicil as testamentary, I decree probate of the will and first codicil only.

Attorneys: *Tucker & Lake.*

(1) 1 Ves. Sen. 190.

1869
Aug. 3.

BROWN AND ABRAHAMS *v.* BROWN AND OTHERS.

*Testamentary Suit—Commission to examine a Witness—Witness not in a precarious state of health, or about to go abroad—*1 *Wm.* 4, *c.* 22—20 *&* 21 *Vict. c.* 77, *s.* 32.

The Court directed a commission to issue for the examination of the surviving attesting witness to a will, which was in litigation before it, although the affidavit filed to support the application merely stated that the witness was upwards of sixty-six years of age, and frequently suffered from ill health.

EBENEZER BALE BROWN, late of Hanger Lane, Ealing, Middlesex, died on or about the 18th day of May, 1869, having made and executed a will dated the 16th of May, 1853, and a codicil dated the 17th of April, 1865, and in the said codicil appointed Alexander Brown and Michael Abrahams, the plaintiffs, executors. The plaintiffs propounded such will and codicil, and in the declaration alleged that the alterations and interlineations appearing on the face of the will were made previous to the execution thereof. The defendants pleaded that the will and codicil propounded were not respectively duly executed in accordance with the provisions of the statute 1 Vict. c. 26, that the alterations and interlineations now appearing on the face of the will were not made previously to the execution thereof; that at the time of the execution of the will the deceased was not of sound mind, memory, and understanding; and that at the time of the execution of the will and codicil respectively the deceased did not know and approve of the contents of the will. As regards the last plea the following particulars were given:—That at the time of the execution of the will the deceased was suffering from the effects of an accident; that the alterations and interlineations appearing upon the will were not inserted by him, nor by his directions; that after their insertion the will was not read over to him, nor was he made aware that they existed thereon; and that at the time of the execution of the said codicil the deceased was not aware that the said alterations and interlineations appeared thereon. A summons was taken out by the plaintiffs, calling upon the defendants to shew cause why James Secker, the surviving attesting witness to the execution of the will of the deceased, should not be examined as a witness in this cause . . . on

the ground of the advanced age of the said witness. It was supported by two affidavits from Mr. Roffey, the attorney for the plaintiffs, who said that the execution of the will of the deceased was attested by James Secker and Ellen O'Halloran, and that he had been informed, and believed, that the latter is dead; that James Secker is of the age of sixty-five, and that he had been advised that it will not be safe to proceed to trial without his evidence, and that it will be necessary to take such evidence de bene esse, and without delaying the same to the hearing of the cause; that although he had ascertained that a lady named in the will as Adonise Alexandrine Hamants was present in the room at the time the testator signed the will, he had been advised that it would not be safe to proceed to the trial of the cause on the question of due execution upon her evidence alone. There was also an affidavit from Alexander Brown, one of the plaintiffs, who said that James Secker, the surviving attesting witness, is upwards of sixty-six years of age, and frequently suffers from ill health, and for this reason alone he and his co-executor are desirous that the examination of the said James Secker should now be had de bene esse.

In opposition to the application an affidavit was filed from the managing clerk to the defendants' attorney that he had been advised that it would be impossible to cross-examine the surviving attesting witness, if he should be ordered to be examined before the trial of the cause, without material prejudice to the defendants' case.

The summons was heard before Lord Penzance in chambers, on the 27th of July, 1869, and by him adjourned into Court.

Dr. Tristram applied to the Court to order the commission to issue. This witness is the only person who can speak to the time at which the alterations and interlineations appearing on the face of the will were made, which is a material fact in this case. Under such circumstances the Court of Chancery would order his examination de bene esse. He referred to *Shirley* v. *Earl Ferrers* (1); Daniel's Chancery Practice, part 2, s. 3; 20 & 21 Vict. c. 77, s. 32; 1 Wm. 4, c. 22, ss. 4, 10.

(1) 3 P. Wms. 77.

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Bayford opposed the application. The practice of the Court of Chancery does not apply. The 32nd section of 20 & 21 Vict. c. 77, gives this Court the same powers only for the examination of witnesses on commission that are given to the common law courts at Westminster, and in those courts a commission will not issue, unless the witness is out of the jurisdiction of the Court, or is about to leave the country, or is in such a precarious state of health as to render it highly probable that he will be unable to attend the trial. It will be prejudicial to the interests of the defendants to disclose their case before the hearing.

LORD PENZANCE. I think this application must be granted. The first question is, what power has the Court in the matter? For, unless I have jurisdiction, I cannot grant the application. The 32nd section of the Probate Act gives to this Court all the powers given to the courts of law at Westminster by 13 Geo. 3, c. 63, and by 1 Wm. 4, c. 22, for enabling the courts of law at Westminster to issue commissions . . . and all the provisions of the said Acts, and of any other Acts, for enforcing, or otherwise, applicable to such examination, and the witnesses examined, shall extend and be applicable to the Court of Probate. And by one of the statutes therein referred to, namely, 1 Wm. 4, c. 22, s. 4, power is given to the Courts of common law, in any suit depending before the Court, to order the examination on oath, before a person to be appointed, of *any witnesses* within the jurisdiction of the Court where the action shall be depending. In this statute there is no limitation, but in practice the Courts of common law have not exercised this power unless the witness was shewn to be about to leave the country, or was in such a state of health as to render it improbable that he would be able to attend at the trial. The Court of Chancery, however, has always been ready to step in and extend the powers exercised by the common law courts on a separate application being made to it, and would do so in this case. I think it is a great evil that a suitor should be sent from court to court, and should depend upon the assistance of another court to obtain the relief which he ought to have in the court in which his suit has been instituted. It seems that the Court of Chancery has been in the habit, in suits to perpetuate testimony, of taking the

examination of important witnesses if there is a danger of the testimony being lost by reason of death. I see no difference whether the witness be sixty or seventy years of age, or whether there be only one witness who can speak to a particular point. The real substantial matters for consideration are, whether the testimony offered will be pertinent to the point at issue, and whether it is of such value that, if lost by the common and ordinary accidents of life, the party in whose favour it would have been given would be seriously injured. In the present case the witness is an attesting witness, whose testimony would clearly be within the definition, and I think he ought to be examined. It is suggested that the case of the defendants would be disclosed on the cross-examination, but that must always be the case when a witness is ordered to be examined on interrogatories either in the Court of Chancery or in the Courts of common law, and there seems to be no advantage in maintaining secrecy about the defence. It would be a great evil if I were to refuse the application, and then by the death of the witness there should be a failure of justice.

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Attorneys for plaintiffs: *Abrahams & Roffey.*
Attorney for defendants: *George J. Brown.*

IN THE GOODS OF BRIDGET GAYNOR.

Aug. 5.

Chain of Executors—Probate of Will of First Deceased granted in Ireland—No grant in England—Probate of Will of Second Deceased granted in Ireland—Re-sealed in England—Practice.

The deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the Prerogative Court of Armagh, Ireland, but no grant was made in this country. The will of the sole executor of the husband was also proved in Ireland, but was re-sealed in London:—

Held, that the executor under the last-mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of the deceased.

BRIDGET GAYNOR, the wife of William Gaynor, late of Athlone, Westmeath, Ireland, died on the 8th of June, 1841, intestate, leaving her husband surviving her, who subsequently, on the 7th

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of September, 1848, also died without having taken upon himself administration of her effects. William Gaynor made and executed a will bearing date the 10th of July, 1848, and a codicil dated the 30th of August, 1848, and therein named his uncle, John Gaynor, sole executor and residuary legatee. John Gaynor proved the will and codicil of William Gaynor in the Prerogative Court of the Archbishop of Armagh on the 21st of September, 1848, but did not obtain probate thereof in this country. John Gaynor died on the 21st of August, 1865, without having taken administration to the effects of Bridget Gaynor; and on the 13th of September, 1865, probate of his will was granted in the principal registry of her Majesty's Court of Probate in Ireland to James John Gaynor, George Atkinson, and William Stanley, as the executors therein named. This probate was duly sealed in the principal registry of this Court in May, 1869. Bridget Gaynor was entitled at her death to a reversionary interest in a sum of 200*l.* payable upon the death of Barbara Smyth, who died in December, 1863, which is the only property within the jurisdiction of this Court.

Aug. 3. *McMahon* moved the Court to order administration of the effects of Bridget Gaynor to issue to James John Gaynor, George Atkinson, and William Stanley, as now representing William Gaynor, the husband of the deceased. Although the will of William Gaynor was never proved in this country, the Irish grant made to John Gaynor authorized him to transmit the representation of the first deceased to his executors, and this Court will recognize that he has done so. He referred to Williams on Executors, pt. 1, Bk. 4, ch. 2; *Shaw* v. *Storton* (1); *Fowler* v. *Richards* (2); *Williams* v. *Bland* (3); *Twyford* v. *Trail* (4); *McMahon* v. *Rawlings* (5); *In the Goods of Mary Powell* (6); *In the Goods of John Owen* (7); *In the Goods of Tucker.* (8)

Aug. 5. LORD PENZANCE. The intestate in this case was the wife of William Gaynor, and she pre-deceased him. William Gaynor died in 1848, before this Court was established, having

(1) 1 Freem. 102.
(2) 5 Russ. Ch. 39.
(3) 2 Coll. 575.
(4) 7 Sim. 92.
(5) 16 Sim. 429.
(6) 3 Hagg. Ecc. 195.
(7) 2 Rob. Ecc. 561.
(8) 2 Sw. & Tr. 123.

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made a will whereof he appointed John Gaynor sole executor. John Gaynor proved this will at Armagh, in Ireland, but not in England. He died, having made a will in which he appointed three persons executors, who proved it in Ireland, and also had the probate sealed in this country, so that they fully represent John Gaynor, and they now ask for a grant of administration of the estate of William Gaynor's wife. The objection to the grant is, that it will not be in conformity with the practice of the Court. The applicants are the executors of John Gaynor; but John Gaynor never proved his testator's will in this country, and therefore it is said that the chain of representation was broken. On the part of the applicants it was insisted that the fact of John Gaynor having proved the will in Ireland, although it gave him no power over the estate of his testator in England, still was sufficient to continue the chain of representation, and this is the question before the Court. Upon the best consideration I am able to give to the case, I have come to the conclusion that the chain of representation has not been continued, and that the applicants are not entitled to the grant. The question will be simplified by considering it as if it had arisen during the lifetime of John Gaynor. Mrs. William Gaynor having died, her property passed to her husband. He died, having made a will, in which John Gaynor was executor, and John Gaynor took probate of it in Ireland. Could John Gaynor have obtained a grant in this Court in the goods of the deceased Mrs. William Gaynor, without first taking probate in this country of the will of his testator? It seems to me to be quite clear that he could not. The system of making grants to those who claim through a chain of executors is nothing more than following the legal interest. John Gaynor, as executor under an Irish probate, had no interest in or control over the property of William Gaynor, his testator in England. The Irish probate gave him no power to deal with English assets, and could give him none. At the time of the death of William Gaynor he was possessed of assets in England, namely, his wife's estate, and if John Gaynor had wished to possess himself of that he ought to have taken out a grant here; but having died without having taken any such grant, he was at no time entitled to any control over the estate of the wife of William Gaynor, and his executors are in no better position than

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he was. Whatever rights they have are transmitted rights. If he had no right himself to come to this Court and ask for a grant, à fortiori, those to whom he has transmitted his rights cannot do so. There are several cases which throw some light on these matters, but the nearest is that of *Twyford* v. *Trail* (1), of which the marginal note is "A. died in India; B., one of his executors, proved his will in India. B. died, and C., his executor, proved his will in England. C. is not the personal representative of A." This marginal note shortly states the result of that case, and it seems to me that it decides the matter we are dealing with. The question was very ably argued, and it was suggested that some sort of difference existed between the full right of an executor, with which it was conceded that John Gaynor was not clothed, and a certain sort of partial right sufficient to continue the chain of representation. The Court, in its desire to render superfluous grants unnecessary, has very much considered that view of the case in order to determine whether it reposed on any solid foundation. I am unable to say that it does. Either a man takes a grant and is executor, having power over and the obligation and the duty of administering the estate, or he does not take a grant, and then is nothing quoad the estate, and cannot be a link in the chain of representation. For these reasons I cannot grant the application; but no difficulty will arise, because John Gaynor was not only executor to William Gaynor, but also the residuary legatee named in his will.

Attorney: *J. P. Murrough.*

(1) 7 Sim. 92.

IN THE GOODS OF STEWART.

1869
March 16.

Administration—Grant to a Creditor ad colligenda bona—Practice.

Where a loss to the estate was likely to occur if a grant of administration were delayed, the Court made a grant ad colligenda bona to a creditor, but directed that, after payment of necessary charges, the balance should be deposited in the Registry until a general grant should issue.

CHARLES STEWART, late of Hull, died on the 18th of January, 1869, intestate, leaving a widow and children surviving him. The deceased was a timber merchant, and his estate chiefly consisted of his stock of timber and of trade debts. Affidavits were filed shewing that the timber was subject to charge, and that it would deteriorate in value if it remained unsold, and that there was a risk of losing some of the debts if any delay occurred in collecting them. The estate was valued at 2000*l.*, and the deceased owed about 7000*l.* to various creditors. The widow and those of the children who were in England had renounced administration, but some of the children were abroad.

Dr. Tristram moved for a grant of administration ad colligenda bona to Mr. Pease, a creditor, and referred to *In the Goods of Clarkington.* (1)

THE COURT made the grant as prayed, but directed that, after payment of the charges on the timber and servants' wages, the balance should be paid into the Registry until a general grant should issue, and that the next of kin abroad should be cited at once in order that a creditors' grant might be made as soon as possible.

Attorneys: *Chester & Urquhart.*

(1) 2 Sw. & Tr. 380.

1869
May 4.

BARNES *v.* DURHAM.

Administration; Revocation of—Revoked Letters of Administration not brought into Registry—Proctor's Lien—Practice.

The proctors who had obtained a grant of administration with the will annexed held the letters in their hands, having a lien on them for their costs, and declined to deposit them in the Registry for the purpose of being cancelled. The administrator having been cited, did not shew cause against their revocation, and on proof that they were improperly issued, the Court ordered them to be revoked without being brought into the Registry, and further ordered that the person at whose instance they were revoked should bring them into the Registry as soon as they came into his possession, and that the proctors should be served with a copy of the order.

THE plaintiff was the executor of the will of Elizabeth Durham, widow, deceased, of which he obtained probate in January, 1868. The defendant, who was a son of Elizabeth Durham, had previously obtained a grant of letters of administration on the false suggestion that she had died intestate, and that administration was revoked before probate was granted to the plaintiff. As administrator of Elizabeth Durham, the defendant had obtained a grant of administration with the will annexed of her deceased husband, John Durham. Elizabeth Durham was appointed sole executrix and residuary legatee of that will, but died without having proved it. In February, 1868, the defendant was cited at the instance of the plaintiff to bring in the letters of administration with the will annexed of John Durham, deceased, and to shew cause why they should not be revoked. This citation was served on him by advertisement, and a copy of it was also served on Messrs. Moore & Currey, his proctors, who had acted for him in the matter. Messrs. Moore & Currey stated that they held the letters of administration, but they refused to give them up as the defendant had not paid the costs of obtaining them, and they had a lien upon them for those costs.

Dr. Tristram moved that letters of administration with the will annexed of the personal estate and effects of John Durham, deceased, might be revoked, and that such order as to the Court might seem fit might be made as to those letters in the hands of Messrs. Moore & Currey, and that the defendant might be condemned in

the plaintiff's costs. The defendant was aware that there was a will of Elizabeth Durham in existence when he took out administration.

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LORD PENZANCE. As Messrs. Moore & Currey have a lien, I make this order:—That the grant of administration with the will annexed of John Durham be revoked; that the plaintiff bring the letters of administration into the Registry, if at any future time they should come into his possession; and that a copy of this order be served on Messrs. Moore & Currey; and I condemn the defendant in the plaintiff's costs.

Attorneys: *Nethersole & Speechley.*

DITCHFIELD *v.* DITCHFIELD.

June 4.

Costs—Two Suits by Wife—Practice.

A wife instituted a suit for nullity of marriage on the ground of the husband's impotence. She failed to establish the charge and the suit was dismissed, but the husband was ordered to pay and paid a certain sum towards her costs. She afterwards instituted a suit for dissolution on the ground of his adultery coupled with cruelty, and she established those charges and obtained a decree. The husband was condemned in the wife's costs of the suit for dissolution, but he was allowed to deduct therefrom the amount which he had paid on account of her costs in the suit for nullity.

2 P.M. 335-7

THIS was a petition by a wife for dissolution of marriage on the ground of adultery coupled with cruelty. The respondent entered an appearance but filed no answer. The cause was heard before the Judge Ordinary, and a decree nisi was granted.

Dr. Spinks, Q.C. (*Inderwick* with him), for the petitioner, asked for the usual order condemning the respondent in costs.

Searle, for the respondent, read affidavits showing that the cohabitation ceased in 1863; that in February, 1864, the petitioner instituted a suit for nullity of marriage on the ground of the respondent's impotence; that she failed to establish that charge, and the petition was dismissed (1); and that the respondent had paid the petitioner's costs of the suit for nullity to the amount of 64*l.* The respondent ought not to be saddled with the costs of both suits.

(1) Ante, p. 127. 12 Jur. N.S. 344, 673.

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The petitioner must have known that there was no foundation for the first suit, and she ought not to have instituted it.

Dr. Spinks. The petitioner may have supposed that the allegation in the former petition was true, although she failed to establish it. The Court cannot make any order in this suit respecting the costs of a former suit, and having succeeded she is entitled to her costs.

THE JUDGE ORDINARY. The Court cannot make any order for the payment of the costs in the former suit, but it is competent to the Court to order the respondent to pay either the whole or only a part of the costs of this suit. The respondent has by his misconduct rendered himself liable to the costs of one suit, but I think he ought not to be required to pay the costs of two suits, one of which was erroneously or improperly instituted. The order will be that the respondent be condemned in the costs of the present suit, but that he be allowed to deduct from those costs the amount which he has paid on account of the petitioner's costs in the suit for nullity.

Attorney for petitioner: *J. J. Rae.*

Attorneys for respondent: *Rickards & Walker.*

June 22.

TICHBORNE *v.* TICHBORNE; EX PARTE NORRIS.

*Administration pendente lite—Application of Creditor not party to the Suit—Receiver in Chancery—*20 & 21 *Vict. c.* 77, *s.* 70*—Costs—Practice.*

2 P. & M. 42

The Court has power, under 20 & 21 Vict. c. 77, s. 70, to appoint an administrator pendente lite in contested testamentary and administration suits, on the application of a person who is not a party to such suit.

In an administration suit which was likely to be protracted, the Court appointed an administrator pendente lite, at the instance of a creditor who was not a party to the suit.

The Court will appoint an administrator pendente lite if it is just and proper to do so, although a receiver may have been appointed by the Court of Chancery, in a suit pending between the same parties and affecting the same property as the testamentary or administration suit.

The costs incurred by a creditor in obtaining the appointment of an administrator pendente lite were allowed out of the estate.

THIS was an administration suit, in which the plaintiff and defendant were contesting the right to a grant of administration

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of the personal estate and effects of Lady Tichborne, deceased. A suit between the same parties raising similar questions was pending in the Court of Chancery. Stuart, V.C., had made an order in that suit appointing Mr. R. Humphreys receiver of the personal estate of the deceased.

May 25. *Dr. Deane, Q.C.*, on behalf of Mr. Norris, a creditor of the deceased, moved for an order appointing Mr. R. Humphreys administrator pedente lite in the suit pending in this Court. The ground of the application was, that as receiver Mr. Humphreys could only collect the estate, and unless he were also appointed administrator he had no power to discharge the debts due from the estate.

Dr. Tristram, for the plaintiff, consented to the appointment of some person as administrator, but objected to Mr. Humphreys.

Sir J. D. Coleridge (*S. G.*), and *Bayford*, for the defendant, opposed the motion. A receiver having been appointed by the Vice-Chancellor, it is unnecessary to appoint an administrator, and such an appointment might lead to a conflict of jurisdiction. A receiver is bound to deal with the estate according to the orders of the Court of Chancery, and it might be a contempt of that court if he were to deal with it as administrator.

LORD PENZANCE. I doubt whether there is any precedent for the appointment of an administrator pendente lite, except at the instance of one of the parties to the suit. At the same time it seems contrary to justice and good sense that a creditor of an intestate's estate should remain unpaid whilst two of her relatives are squabbling about the right to administration. But then arises the question whether it is desirable to appoint an administrator when the Court of Chancery has already appointed a receiver? It would certainly be most undesirable to appoint any person other than the receiver, but I am not at present satisfied that it is necessary to appoint even that gentleman. It seems to me that application should in the first instance be made to the Court of Chancery for the payment of the debt, but if for any technical reason it is necessary that an administrator as well as a receiver should be appointed, I shall be happy to lend the powers of this Court for the

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purpose of carrying the intentions of the Court of Chancery into effect. At present, therefore, I make no order.

June 22. *Dr. Deane, Q.C.* (*Ramadge* with him), renewed the motion, and stated that an application had been made to Stuart, V.C., who suggested that the better course would be to obtain the appointment of an administrator pendente lite from the Court of Probate. There seems to be no precedent for such an order at the instance of a creditor, but this court has larger powers under the statute than the Prerogative Court. It would be a great hardship to oblige the creditors of a solvent estate to wait for payment of their debts until the termination of a protracted litigation which cannot affect their rights.

Dr. Tristram, for the plaintiff, consented to the order, but objected to the appointment of Mr. Humphreys.

Bayford (*Sir J. D. Coleridge* (*S. G.*), with him), for the defendant, opposed the motion.

LORD PENZANCE. It would be a palpable injustice to oblige the creditors of the estate to wait for the payment of their debts until the termination of a long litigation, in which they have no interest whatever, between the parties who are contesting the right to a grant of administration. I am therefore strongly disposed to use any power which this Court may possess to help them and to prevent that injustice. The Court has no power to order their debts to be paid, but it has power to appoint an administrator who can pay them. A technical difficulty has been suggested that no such appointment has ever been made in a suit at the instance of a creditor. I can find no trace of such an order in the Prerogative Court, and perhaps by the practice of that court it could not have been made. But this court has statutory powers conferred on it in addition to those which it derives from the Prerogative Court. The 70th section of 20 & 21 Vict. c. 77, says that, "pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person." There is no qualification in these words, nothing to limit the powers of the

Court to cases in which the application for such an appointment is made by a party to the suit. The words are general, and appear to me to confer power on the Court, as soon as a suit is instituted touching the validity of a will or a right to a grant of administration, to appoint an administrator pendente lite upon the application of any person, if such appointment would be just and proper. Therefore, if there is no precedent, I am quite prepared to make one.

But my difficulty, when the former application was made, was this; I was told that a receiver had been appointed by the Court of Chancery, who had got in the estate, and it occurred to me that the appointment of an administrator might lead to a conflict of jurisdiction. The remarks of the Vice-Chancellor have satisfied me on that head, and I gather that as soon as the Court of Chancery finds any one clothed by this Court with the character of an administrator, even although he is only appointed pendente lite, it will discharge the order for a receiver, and will allow the administrator to receive the estate, but that it will then hold its hand over his dealings with it and make such orders upon him as it may think proper. Thus there is no difficulty in the matter, and no danger of any conflict of jurisdiction. This court can do nothing to compel payment of the debts, but it can appoint an administrator, and the Court of Chancery holding its hand over that administrator can make such orders as it thinks right for the payment of the debts.

It has been suggested that the order will be worthless, inasmuch as the Court of Chancery will keep enough money in its hands to pay the costs of the suit. That court will deal with the matter according to its practice, but it certainly seems rather hard justice that the creditors should not be able to get their debts paid because other persons want to spend the estate in squabbling over their rights.

The order will therefore go as prayed, and I have no doubt that Mr. Humphreys, the receiver, is the proper person to be appointed administrator.

Dr. Deane, Q.C., asked for the creditors' costs of the application.

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LORD PENZANCE. Yes; I think the creditors ought to have their costs out of the estate, for the proceeding is a necessary one in order to obtain payment of their debts.

Attorneys for creditors: *Parker, Rooke, & Parkers.*
Attorneys for plaintiff: *Walter & Moojen.*
Attorneys for defendant: *Dobinson & Geare.*

April 24.

ROSS *v.* ROSS.

Connivance—Agreement to Separate.

A deed of separation securing an allowance to a wife, held not to prove the wife's connivance at the husband's adultery, in the absence of evidence that at the time when it was entered into the wife was aware of the adulterous intercourse which the husband had then established with another woman, and that she consented to its being continued.

If a wife, although unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him she is guilty of connivance.

THIS was a wife's petition for judicial separation, on the ground of adultery. The respondent did not deny the charge, but alleged connivance. The cause was heard by the Judge Ordinary without a jury.

Evidence was given that the parties were married in 1846, and cohabited for nearly twenty years, and had several children, and that since the cohabitation had ceased, the respondent had been living in adultery with Maria Smith, formerly a domestic servant in his employment.

The question raised by the respondent's plea turned mainly upon the construction of an agreement to live separate, signed by the parties on the 26th of October, 1866, previous to the date of the adultery alleged in the petition. The agreement, after the usual recital of unhappy differences, provided that the wife should be allowed to live separate from the husband for the future, without any interference on his part; that she might live where and in what manner she pleased; that he would take no proceedings to oblige her to return to cohabitation; that she should enjoy any

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property which might devolve on her; and that he would pay her an allowance of 88*l.* a year. On her part she agreed that she would not contract any debts; and that their young child, William Scarth Ross, should be supported by her until he was five years old, and after that time by the respondent.

The respondent's case was, that at the time when this agreement was entered into he was carrying on an adulterous intercourse with Maria Smith; that the petitioner was aware of this intercourse, and was willing to allow it to continue as long as the respondent made a provision for her, and that it was understood by both of them that the intercourse was to continue.

The petitioner's case was, that although she had suspected the intimacy of the respondent with Maria Smith, and her suspicion had given rise to frequent quarrels between them, she was not aware that adultery had actually been committed, but believed the respondent's repeated assurances that her suspicions were unfounded; that on several occasions, and particularly on the day when the agreement was signed, she had declared that she would never consent to his living with Maria Smith, and that he then assured her that he was not living with Maria Smith, and that he never intended to do so.

Dr. Deane, Q.C. (*Bayford* with him), for the respondent. If the Court is satisfied that the petitioner gave her consent to the continuation of the adultery, whether that consent were given willingly or unwillingly, the plea of connivance is established: *Thomas* v. *Thomas.* (1)

Dr. Spinks, Q.C. (*Pritchard* with him), for the petitioner. Connivance means a willing consent, not a consent which is extorted. If the petitioner signed the agreement because she could not obtain an allowance for her subsistence except by signing it, she would not have connived, even if she had known of the adultery. Connivance is construed more strictly against a husband than against a wife. He cited *Marris* v. *Marris.* (2)

The Judge Ordinary. The husband's adultery is proved, and the wife is entitled to a judicial separation, unless it is shewn that she connived at the adultery. Now, connivance means consent,

(1) 2 Sw. & Tr. 113; 31 L. J. (P. M. & D.) 69. (2) 2 Sw. & Tr. 530.

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and the Court acts upon the principle volenti non fit injuria. The consent of the wife in this case is supposed to be proved by the agreement which she signed. The agreement, however, contains no provision whatever with regard to the contemplated future life of the husband. Nothing is said in it as to where or in what manner he is to live. *Thomas* v. *Thomas* (1), was cited, to shew that such an agreement as this amounts to connivance. But the agreement in *Thomas* v. *Thomas* (1), recited the fact that the husband was then living with another woman, and went on to recite that proceedings were about to be taken on account of his adultery; and it then provided that the proceedings should not be taken, and that a certain sum should be settled on the wife. That was held to constitute a sort of bargain between the parties that the husband should continue to live with the same person with whom he was recited to be then living. But here there is no such bargain; and the agreement says nothing about Maria Smith, or the future life of the husband. The learned judge, in his judgment in *Thomas* v. *Thomas* (1), relied on a case of *Barker* v. *Barker* (2), in the Ecclesiastical Court. The terms of the deed of separation in that case were very strong, for the husband covenanted and agreed "that it shall and may be lawful for the said Amelia Penelope Barker (the wife), from time to time and at all times, during the present coverture, to live separately and apart from him the said Samuel Barker, in such manner and at such place and places, and with such person and persons, as the said A. P. Barker shall, from time to time, think proper to choose (notwithstanding her present coverture), and as if she were sole and unmarried." The wife was said to have been living with another man at the time when that deed was executed, and it was held, in the first instance, that the deed amounted to a license or consent on the part of the husband that she should continue to do so. But there was an appeal from the Consistory Court to the Arches, and on that appeal Sir J. Nicholl came to the conclusion that there was no connivance on the part of the husband, and that, notwithstanding the formal words which had been introduced into the agreement, the husband never intended to consent, and never did consent, that the wife should lead an abandoned life. "The pre-

(1) 2 Sw. & Tr. 113; 31 L. J. (P. M. & D.) 69. (2) 2 Add. 285.

sumption," he says, " which this (the deed) would raise against the husband, would, it is true, be the same in both courts; but, whereas that presumption in the court below was not rebutted by any evidence, it is in this, the appellate court, I think amply so rebutted. For the husband in this court, as he was fully entitled to do, has brought in a further allegation pleading the circumstances under which the original separation was had, and a correspondence by letter, which took place between him and the wife, subsequent to the separation — several letters from the wife being exhibited in supply of proof; as also the letter from the mother, in which she communicated to her son-in-law the first information that he received of his wife's elopement. From the evidence taken upon this allegation, and from the face of these exhibits, I collect, both that the husband was not to blame in the matter of the separation, and that the deed of separation was understood neither by husband nor wife, as dispensing to either, with the obligation of fulfilling the marriage vow, in the article of fidelity, so far as the consent of the other party was concerned; however the contrary might seem upon the mere wording of the deed."

The learned judge, therefore, appears to have taken a course which was extremely just and proper. He forbore to rely wholly and solely on the terms of the deed, and investigated the circumstances under which the deed was entered into, and entertained the broad question, whether, taking the deed itself and all the surrounding circumstances into consideration, the husband did, in fact, consent that the wife should live in adultery.

The Court is bound to take a similar course in all cases of this nature, for nothing would lead to greater injustice than to determine them upon technical definitions. What a man writes is, no doubt, stronger than what he says. What he does by deed is of greater stability and force in law than what he does by parol, and the contents of any deed which he has executed should be closely scanned. But, allowing all this, it is still proper to let in as much light as possible by evidence as to his intention, and the Court, when the whole matter is placed before it, ought not to determine that there was connivance, unless it sees its way very clearly to the conclusion that it was the intention of the parties to connive.

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In this case I am of opinion that there is really no satisfactory evidence at all of connivance. There is no proof that the respondent was living with Smith before the date of the agreement; and although the petitioner suspected and frequently charged him with an improper intimacy with Smith, yet it appears that he constantly denied it.

As to what occurred on the day when the agreement was signed, there is some discrepancy in the statements of the different witnesses; but, in the absence of evidence that the respondent was then living with Smith, it is impossible to come to the conclusion that the petitioner ever in any form gave her consent to a continuance of the adulterous intercourse with Smith. The plea of connivance therefore fails.

A question having been raised as to "willing consent," I may add that if it were established that the wife consented, as one of the conditions of the grant of the allowance, to the husband continuing the adulterous intercourse which had been established, such consent would, in my opinion, amount to connivance, even if it were extorted from her by the pressure of the circumstances in which she was placed, unless, of course, the pressure to which she was subjected amounted to that degree of force which would invalidate any agreement. She might be very unwilling to consent, but if in the end she withdraw her scruples for the sake of getting an allowance, I think she would be guilty of connivance.

A judicial separation was accordingly decreed.

Attorneys for petitioner: *Gregory, Rowcliffes, & Rawle.*
Attorneys for respondent: *Edwards, Layton, & Jaques.*

ST. PAUL *v.* ST. PAUL AND FARQUHAR; THE QUEEN'S PROCTOR INTERVENING. 1869 *June* 3.

Dissolution of Marriage—Wilful Neglect conducing to Adultery—20 & 21 Vict. c. 85, s. 31.

The wilful neglect or misconduct which deprives a petitioner of his right to a decree under 20 & 21 Vict. c. 85, s. 31, is wilful neglect or misconduct which has conduced to the respondent's first fall from virtue. Conduct which would have amounted to wilful neglect and misconduct within the meaning of the section, if committed prior to the respondent's first act of adultery, but not amounting to connivance, will not deprive the petitioner of his right to a decree when not committed until after an adulterous intercourse has been established between the respondent and the co-respondent.

ALBERT ST. PAUL, a solicitor at Maidenhead, in Berkshire, prayed for a dissolution of his marriage with Lucy St. Paul, on the ground of her adultery with Duncan Anderson Farquhar, a captain in the Dragoon Guards.

The adultery charged in the petition was from the 24th of February, 1867, to the date of the filing of the petition on the 31st of May, 1867. The respondent entered an appearance, but filed no answer. The co-respondent filed an answer, denying the charge of adultery, and alleging connivance. The cause was heard by the Judge Ordinary on the 1st of May, 1868, and was undefended, neither the respondent nor the co-respondent being represented by counsel. The adultery was proved, and a decree nisi was pronounced, with costs against the co-respondent.

In July, 1868, the Queen's Proctor intervened, and afterwards filed pleas alleging collusion; that previous to the adultery charged in the petition, the respondent and co-respondent had committed adultery, and such adultery was known to the petitioner at the time of the filing of the petition, and at the time of the hearing of the suit, but was not brought to the knowledge of the Court; that the petitioner connived at and acquiesced in the respondent's adultery; that the petitioner was guilty of misconduct, conducing to the respondent's adultery; and that divers material facts had not been brought to the knowledge of the Court.

The petitioner replied, denying the charge of collusion; denying that at the time of the hearing of the suit the acts of adultery

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previous to those alleged in the petition were known to him; denying that he had been guilty of connivance or acquiescence, or conduct conducing to the adultery; and alleging that the material facts were, in substance, brought to the knowledge of the Court at the hearing of the cause.

These issues were tried before the Judge Ordinary on the 2nd and 3rd of June, 1869.

Sir R. Collier (*A. G.*), *Dr. Spinks, Q.C.*, and *Archibald*, were for the Queen's Proctor.

H. Giffard, Q.C., *McIntyre*, and *E. S. Dunn*, for the petitioner; and *Pritchard*, for the co-respondent.

The parties were married on the 29th of September, 1859; the respondent, who was very young at the time of the marriage, being the daughter of a gentleman who resided near Cork. They lived together after marriage at Maidenhead, and had three children. In 1865, Mrs. St. Paul went to stay at a hydropathic establishment at St. Ann's Hill, near Cork. She was frequently visited by Captain Farquhar, who was a friend of her father, and evidence was produced to prove that the adulterous intercourse was commenced at that time. Mr. St. Paul visited his wife whilst she was at the establishment, and during his stay he was introduced to Captain Farquhar. He stated, however, that he had no reason to suspect, and did not suspect, any impropriety between them. She afterwards went to the Isle of Man, for the purpose of being confined, with her husband's knowledge, but against his wish; and after having given birth to a child, she returned to her husband at Maidenhead.

On the 24th of February, 1867, Mrs. St. Paul left Maidenhead, for the purpose of paying a visit to her father at Cork. Captain Farquhar accompanied her, and they left London together by the limited mail with Mr. St. Paul's knowledge and consent. They slept together that night at an hotel at Stafford, and then proceeded to Dublin, where they stayed at an hotel, passing as brother and sister. Mr. St. Paul, having heard by accident that she was in Dublin, and not in Cork, wrote to her, and afterwards went over to Dublin. He there saw her, and her father, and Captain Farquhar. He

swore that up to that time he had entertained no suspicion of any improper intimacy between her and Captain Farquhar, and that all three of them assured him that no impropriety had occurred. She was anxious to have a separation, but both he and her father objected to it, and at last she agreed to return to Maidenhead. After their return to Maidenhead, he discovered that she was keeping up a correspondence with Captain Farquhar, and he insisted that it should be broken off, and that she should not see Captain Farquhar again. He also wrote to Captain Farquhar as follows:—

"May 6th, 1867.

"Dear Sir,—When in Dublin I spoke to you about ceasing your correspondence or intimacy with my wife. I find you have not carried out your promise to me. Unless you can satisfactorily explain this, I fear you have forfeited the appellation of a gentleman.

"I am, Sir, yours faithfully,

"Albert St. Paul."

To this Captain Farquhar replied as follows:—

"May 8th, 1867.

"Dear Sir,—I am only just in receipt of your letter, dated Maidenhead, 6th of May. In answer, I beg to say that I have no intention to explain what you ask, as I have nothing to explain. I was on an intimate acquaintance with both your wife and yourself, and until you give me some reason to withhold correspondence in a friendly way with your wife, I shall act as I have hitherto done. I can but ascribe your ridiculous epistle as an after-dinner ebullition of temper, and as such I treat it. If your lucid memory had been of any service to you when you penned your epistle, you would have remembered that in Dublin, of which time you speak, you asked me to assist you in inducing your wife to return to England. I considered your conduct somewhat strange, especially as you yourself had made arrangements for me to escort your wife to Ireland. Did I not treat the intimation in your letter with the ridicule it deserves, I should take the matter into my own hands.

"I remain, yours truly,

"Duncan A. Farquhar."

Some other circumstances as to his wife's conduct then came to Mr. St. Paul's knowledge, and, on being pressed, she ultimately con-

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fessed that she had been guilty of adultery. She refused, however, to give him any means of proving her guilt, unless he promised not to claim damages from Captain Farquhar, and he then signed the following memorandum:—"Louie,—Whatever may happen from your conduct with reference to other men, of this you may rest assured, that I shall never seek a solatium for my disgrace in damages from the partner of your guilt.—Your once loving husband, Albert St. Paul."

After her confession he offered to forgive her and take her back if she would never see Captain Farquhar or correspond with him for the future; but she did not accept this offer, and she continued to communicate with Captain Farquhar. Finding that she would not give up Captain Farquhar, and that her confession was confirmed by him, he instituted this suit. Captain Farquhar's solicitor afterwards offered him 1000*l.* to abandon it, but he indignantly refused. The main question in the case was, whether these facts constituted such misconduct as to deprive the petitioner of his right to a decree under 20 & 21 Vict. c. 85, s. 31.

THE JUDGE ORDINARY. In this case the Court has a very difficult and delicate and critical duty to perform. I may say at the outset that no one who has heard the evidence can doubt that, whatever mental anxiety the petitioner may have suffered in the course of these protracted proceedings, he has only himself to blame for it. The evidence proves him to have been wanting in decision, wanting in firmness, wanting in a manly assertion of his own rights, and, also, wanting in judgment; and those deficiencies on his part have led to these proceedings. Turning from the petitioner to the respondent, it is plain that she was a wilful, self-willed, determined woman, who cared little or nothing for her husband from the outset, who was determined to have her own way, and who appears to have obtained a sort of moral ascendancy over him which enabled her to have her own way whenever she was so minded.

The Queen's Proctor, instigated, it is said, by the co-respondent —or, if not by him, by his father, who wishes to stand in the way of this decree being made absolute—has brought before the Court various facts, and made certain charges, against the petitioner.

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It seems to me that there is no impropriety whatever in a co-respondent or a respondent furnishing to the Queen's Proctor the facts which he brings before the Court in cases of this kind. It is for the Queen's Proctor, when he has had the facts furnished to him, to submit them to her Majesty's Attorney-General, and it is then for the Attorney-General to consider them, and to direct whether, in the interest of the public, the expense ought to be incurred of proving them, with a view of stopping the decree. To my mind it matters little or nothing from what source the information came. I have to deal with the facts as they are proved, and to ascertain, to the best of my ability, whether they support the pleas of the Queen's Proctor.

Now the substance of the complaint against the petitioner is twofold: first, that he was guilty of conduct conducing to his wife's adultery; and, secondly, that he was guilty of connivance. The statute provides that the Court may withhold a decree where it is satisfied that the petitioner has been guilty of wilful neglect or misconduct conducing to his wife's adultery. (1) That is a most salutary provision. It is for the public interest that such a safeguard should be provided, and that a husband who has himself thrown his wife into temptation, and exposed her to the addresses of other men, should not be allowed to cast her aside after she has yielded to temptation. Further, it is only fair to the wife herself to permit her to come to this Court and say, "Notwithstanding that I have sinned, my sins really have been brought about, or very much helped forward, by the carelessness, neglect, and indifference of my husband." That is a matter which clearly ought to be taken into consideration in favour even of a guilty wife. But this is very delicate ground, and the Court must be exceedingly careful, in applying this provision, to see its way pretty plainly to the conclusion that the husband's conduct amounted to "wilful neglect or misconduct," and that such "wilful neglect or misconduct" really conduced to the fall of the wife. The words of the statute are, "such wilful neglect or misconduct as has conduced to the adultery." Having considered those words, I have come to this conclusion as to the construction which ought to be placed on them. The legislature does not mean that a husband

(1) 20 & 21 Vict. c. 85, s. 31.

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shall be deprived of his remedy whenever it can be proved that some conduct on his part has conduced to any particular act of adultery after an adulterous intercourse has once been established; but it means that his remedy shall be withheld from him if he has so acted as to bring about that intercourse. That is a most important distinction. It may very well happen that a husband may be perfectly blameless as to his wife's adultery in the first instance; but that after she has established an adulterous intercourse, she and her paramour, acting together for the purpose of blinding the husband, and throwing as much dust in his eyes as possible, may carry on their intimacy in such a way that he may not perceive it, and it may be that, blinded by them, his conduct may appear more or less neglectful. It seems to me that the neglect intended by the legislature is neglect conducing to the woman's fall, and not neglect conducing to any particular act of adultery subsequent to her fall.

The circumstances of this case bring the distinction which I have pointed out into prominent relief. The lady went, in 1865 and the beginning of 1866, to stay at a place, called a hydropathic establishment, about seven miles from Cork, where her father resided. It was at her father's instance that she went to this place; and, looking at the sort of life that the petitioner and his wife had previously led, and her determination to be as little with him as possible, and the want of affection that appears to have existed between them—at any rate on her part—and the little control that he had over her, it is impossible to say that her going to that establishment, avowedly for the sake of her health, can be imputed to the petitioner as an act of wilful neglect. She is found there; and the Court fortunately has a date, from the mouth of the groom of the co-respondent, which fixes a time from which this adulterous intimacy was going on. The groom says: "About January, 1866, I saw the respondent go to the co-respondent's room at the barracks. After that, she used to come with him once or twice a week. She used to go into his room, and remain alone with him for hours." It is quite plain, therefore, that in January, 1866, and the subsequent months, this adulterous intercourse was thoroughly established and continuous. At whatever time the wife's first fall from virtue occurred, it is

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plain that it had occurred long before the period of the husband's visit, for he never went to the hydropathic establishment until Easter, 1866. What then took place? The wife, carrying on at that time this illicit intercourse, persuaded the husband to ask the co-respondent over to the establishment as his guest. He did so, and the co-respondent made himself agreeable to him, and invited him to the barracks, and they used to play billiards together, and so forth. The Court has very little doubt that at that very time, whenever opportunity offered, the same adulterous intercourse was going on. It is impossible, up to this period, to put one's finger upon anything that the husband had either done or omitted to do which could have led to the wife's misconduct. His position was that of a man who was hoodwinked for the time, and who had no reason to suspect anything, because other persons who saw the respondent and the co-respondent together declare that they never saw any signs of familiarity. There really was nothing to show the husband at that time that anything wrong was going on.

The subsequent history of the case is no doubt different. The lady remained at the hydropathic establishment until July, 1866, and she then wrote to her husband that she wished to go to the Isle of Man. He swore positively in answer to a question I put to him that he objected to her going to the Isle of Man, and there does not seem to have been any reason for it. The reason she assigned was that they were badly off and the Isle of Man was a cheap place; but to the Isle of Man she went, and after she had been there for some time she came back to the mainland and went down to Maidenhead, where her husband was living. She was there for some five or six weeks and she then went back to the island, and after she had got back the co-respondent seems to have gone there and stayed three or four days. The next occurrence shews the footing on which the parties were living at that time. The husband had asked her to be allowed (that was his expression) to come and see her at the Isle of Man, and she had refused. He seems to have acquiesced in that refusal, and accordingly went to spend his Christmas with his relations at Clifton. After he returned to business he again wrote to her, and said, "Your confinement is about to take place, may I now come and see you?" She answered

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by telegraph, "Yes, you may;" whereupon he went. He arrived a week before her confinement, and stayed with her during her confinement. Now, the Court is at a loss to see any other object in his going there then, except the pleasure of indulging his affection and being with his wife. She was about to undergo her confinement, and it appears to the Court that he had no other than a most praiseworthy motive in going to see her. When he got there it came out incidentally that Captain Farquhar had visited her, but she gave an explanation of his visit and said he had merely called with some gentlemen. The Court must bear in mind that there is not a tittle of evidence to shew that up to this time the petitioner knew of the adultery which had taken place at the hydropathic establishment, or of any familiarity whatever between these two people. We now know that there was flagrant and open adultery carried on from week to week, from day to day, but the petitioner did not know that, and the mere fact that she told him that Captain Farquhar and some other gentlemen had come over to the island and had called, in the then state of his mind, is not such a fact as was likely to lead him to take any particular steps with a view to his wife quitting the Isle of Man or dropping the acquaintance of Captain Farquhar. She was confined in January, 1867. She came over to England on the 18th of February in that year, and she went down to Maidenhead to her husband. The next thing that happened is, that on Sunday, the 24th of February, she announced to her husband her intention to go to Clifton. As he says, she seems never to have been easy and at rest when she was at home. He appears to have combated her idea of going to Clifton, but ultimately yielded to it, and then she said she had had a return ticket given her to go to Dublin. She also said that she should like to go and see her father, who was said to be unwell, and the husband was interested, on account of some pecuniary transaction, in her seeing her father. Bearing in mind that the wife was carrying on this adulterous intercourse and wanted to get away from her husband in order that she might consort with the co-respondent, and that the petitioner was ignorant of that intercourse, the Court can understand perfectly well that she might wheedle him, or even that she might be strong enough to force him into consenting to her going. He represents

that he consented reluctantly. She stated that Captain Farquhar happened to be going at the same time and had offered to escort her. No one can doubt that the arrangement by which this young woman was to travel down by the night mail with Captain Farquhar was a very imprudent one, but supposing that the husband saw no reason to suspect Captain Farquhar, it is not an imprudence of that sort that would lead the Court at once to come to the conclusion that he had been guilty of wilful neglect or misconduct. As I have already pointed out, what the Court has to inquire into at this period of the case is not whether there was neglect or misconduct, but whether there was connivance? Now everything that fell from all three of the parties, every expression used by the wife, by the respondent, and by the co-respondent, appears to me to negative the idea of connivance. She was making excuses, she was pretending that there was a return ticket, she was invoking her father's illness, all for the purpose of deluding her husband, and he was no doubt more or less deluded; when I say more or less, I mean that a more vigilant man, a man of stronger temperament, would probably have torn aside the sort of veil that was thrown over the facts and would have seen them as they really existed. The respondent and the co-respondent went to Dublin, and then several letters passed between her and her husband. He thought she was going straight through to Cork, and she writes from Reynolds' Hotel, Dublin, and tells him that she is staying there, upon which he writes and expresses his displeasure. I see nothing to induce the Court to believe that he at that time knew that she was under the charge of Captain Farquhar, and that he was paying her expenses, although of course he might and probably did suspect it. He went to Dublin, and then took place various meetings, which have been referred to in the evidence. The sum and substance of them is this. His wife had, before he got there, pressed upon her father the necessity for a separation. It is plain, both from the father's statement and from the statement of the petitioner, that he opposed a separation. He went with the father to the hotel and saw his wife. The account that he gives of that interview sheds a pretty strong light on the temperament and nature of the lady, and the terms they were upon. The father said that he found, upon consideration and after talking with his son-in-

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law, that there was no need for a separation, upon which the wife called him an old weathercock and got very angry with him for having changed his opinion. When he burst out crying she said he was an old fool, and that his tears were very near his eyes. That was a somewhat boisterous meeting, and in the course of it no doubt the petitioner ascertained by finding a great coat that Captain Farquhar had been there. Afterwards he saw Captain Farquhar. The question is, upon all that took place between them, is there anything to lead the Court to the conclusion that he either knew of the adultery, or so strongly suspected the adultery upon sufficient grounds that he could be said to have connived at or acquiesced in it? It seems to me that the whole tendency of the evidence is the other way. He wanted his wife back, he was averse to a separation, and the father and the co-respondent both tried to persuade him, and succeeded in doing so, that nothing wrong had taken place. He inquired of the people belonging to the hotel whether they had been living there as man and wife, and was told that they had not. He tried also to ascertain whether the co-respondent had undertaken to pay for his wife, and could get no satisfactory answer. The result of the whole evidence is that there was a good deal of weakness on his part, and want of proper spirit and determination in the matter, but that being desirous not to part with his wife he was over persuaded that there was nothing wrong in her conduct. Now, I do not think that is a case of connivance. The rest of the history is soon told. He gets his wife back to London and endeavours to withdraw her from the co-respondent. She goes to Maidenhead, then she comes back to London. The whole of the occurrences after she got to England point in the same direction. The wife attempted to get away from her husband in order that she might go to Captain Farquhar; the husband attempting to keep her, although more and more suspecting her guilt. On charging her with her guilt she at first confessed it and told him that she would give him the proofs, and afterwards retracted that confession and led him to believe that there was no guilt. At last there came a meeting at Maidenhead, when the co-respondent and the respondent openly and unblushingly told him that they had been guilty over and over again, placing the first time of their guilt at Stafford. The letter of the

co-respondent of the 8th of May appears to me inconsistent with the idea of connivance. It is a high-handed, impudent letter, repudiating the insinuation of guilt, and unless the Court believes that letter to be part of a scheme to defeat the ends of justice and to cause a false complexion to be put upon this case, it is impossible to imagine that the husband, who wrote the letter to which it is an answer, was all the time conniving at the wife's adultery. It seems to me, therefore, that upon the whole facts of this case, neither the charge of collusion nor that of connivance has been made out against this gentleman. There is no doubt much to reprehend in his conduct. There is much that occurred in the course of 1867, much that occurred previous to the visit to Dublin and at Dublin, and even subsequently, which, if it had led to the wife's loss of virtue, might have induced the Court to come to the conclusion that her sin was caused by his neglect or carelessness, but bearing in mind that the first seduction, the real loss of virtue of the wife, occurred a whole year before, the Court looks upon it in a different light.

It only remains for the Court to state what its finding is on the several issues which the Queen's Proctor has put forward. The Queen's Proctor says first, "That the petitioner is and has been acting in collusion with the respondent and the co-respondent." I am satisfied that there has been no collusion. The second plea is, "That the petition has been filed by the petitioner by arrangement between him and the respondent and the co-respondent, or some other person or persons acting on behalf of the respondent and the co-respondent, or one or other of them." I find that in the negative. The third plea is, "That before the filing of the petition in this suit, the petitioner agreed with the respondent and the co-respondent, that in the event of his obtaining a divorce from the respondent, he would not seek to recover damages against the co-respondent." I find that in the affirmative. The explanation of it is that the respondent and co-respondent promised, if he would not claim damages, to give him proof of the adultery. It is to be noted that in the paper which he signed, what he said was, not "If you will give me proofs of this particular adultery I will not claim damages," but generally, "I should never charge any man with damages, and therefore I will not charge you." The

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fourth plea is, "That before the commission of the acts of adultery alleged in the petition, and after the said marriage of the petitioner and the respondent, the respondent did habitually commit adultery with the co-respondent at St. Ann's Hill." That is, at the hydropathic establishment; and that issue I find in the affirmative. The fifth issue is "that at the time of the filing of the said petition, and at the time of the hearing of this suit, the adultery in the last paragraph mentioned was known to the petitioner, and was not brought to the knowledge of the Court." That I find in the negative. I think that he did bring to the knowledge of the Court all that he knew. He knew nothing of the adultery at the hydropathic establishment, and probably it never would have been known if the co-respondent had not shed the light of his experience upon it. The sixth plea is "That the petitioner connived at and acquiesced in the acts of adultery alleged in the petition, and in this plea." That I find in the negative. The seventh plea is, "That the petitioner was, on divers occasions, guilty of misconduct which conduced to the acts of adultery alleged in the petition and in this plea." That I find in the negative. The eighth plea is, "That divers other facts respecting the conduct of the parties to this suit, which are material to the due decision of this case, have not yet been brought before or to the knowledge of the Court." That I find in the affirmative, because there were many facts which the Queen's Proctor has now been enabled to bring forward which were unknown to the Court.

Upon the whole, after finding the issues in the way I have stated, I desire to express my opinion that the Queen's Proctor has done right in bringing this matter to the attention of the Court.

Attorney for petitioner: *Purkis & Co.*
Attorney for co-respondent: *Chilton & Co.*
The Queen's Proctor.

RULES AND ORDERS.

AMENDED AND ADDITIONAL RULES AND ORDERS FOR HER MAJESTY'S COURT OF PROBATE (IN CONTENTIOUS BUSINESS).

By virtue and in pursuance of the provisions of the statute 20 & 21 Vict. cap. 77, I, the Right Honourable Sir James Plaisted Wilde, Knight, Judge of Her Majesty's Court of Probate, with the concurrence of the Right Honourable Robert Monsey Lord Cranworth, Lord High Chancellor of Great Britain, and of the Right Honourable Sir Alexander James Edmund Cockburn, Baronet, Lord Chief Justice of the Court of Queen's Bench, make and issue the following amended and additional Rules and Orders in respect to the Contentious Business in the said Court of Probate, to take effect on and after the 11th of January, 1866.

Dated the 29th day of December, 1865.

Amended Rules and Orders.

In place of Rule 40 of the Rules and Orders in Contentious Business, and of the Form No. 8 referred to in Rule 38 of the said Rules and Orders, it is Ordered, That—

40. If one party propounds a Will or Testamentary Script in his declaration, and the adverse parties, or either of them, desire to propound another Will or Testamentary Script, the adverse parties must, with their pleas, deliver to the opposite party and file in the Registry a declaration propounding such other Will or Testamentary Script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the Rules and Orders of this Court in respect to the original declaration delivered and filed in the Cause.

40*a*. The party or parties pleading to a declaration propounding a Will or Testamentary Script shall be allowed to plead only the pleas hereunder set forth, unless by leave of the Judge, to be obtained on summons.

1. That the paper writing bearing date, *&c.*, and alleged by the Plaintiff [*or* Defendant] to be the last Will and Testament [*or* Codicil to the last Will and Testament] of *A. B.*, late of, *&c.*, deceased was not duly executed according to the provisions of the Statute 1 Vict. c. 26, in manner and form as alleged.
2. That *A.B.*, the deceased in this Cause, at the time his alleged Will [*or* Codicil] bears date, to wit, on the, *&c.*, was not of sound mind, memory, and understanding.
3. That the execution of the said alleged Will [*or* Codicil] was obtained by the undue influence of *C. D.* and others acting with him.
4. That the execution of the said alleged Will [*or* Codicil] was obtained by the fraud of *C. D.* and others acting with him.
5. That the deceased, at the time of the execution of the said alleged Will [*or* Codicil] did not know and approve of the contents thereof.

Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the Judge) deliver to the adverse parties and file in the Registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith.

Additional Rules and Orders.

Writs of Attachment and other Writs.

107. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the Judge by motion in Court.

108. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the Registry, with an office copy of the order, and when approved and signed by one of the Registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge to sign such writs.

109. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge if the Court be then sitting; if not, then to one of the Registrars, who for good cause shown shall have power to order such discharge.

(Signed) JAMES PLAISTED WILDE.

Approved.

CRANWORTH, C.

A. E. COCKBURN.

AMENDED RULE AND ORDER FOR HER MAJESTY'S COURT OF PROBATE (IN NON-CONTENTIOUS BUSINESS).

By virtue and in pursuance of the provisions of the Statute 20 & 21 Vict. cap. 77, I, the Right Honourable Sir James Plaisted Wilde, Knight, Judge of Her Majesty's Court of Probate, with the concurrence of the Right Honourable Robert Monsey Lord Cranworth, Lord High Chancellor of Great Britain, and of the Right Honourable Sir Alexander James Edmund Cockburn, Baronet, Lord Chief Justice of the Court of Queen's Bench, make and issue the following amended Rule and Order in respect to the Non-Contentious Business in the said Court of Probate, to take effect on and after the 11th of January, 1866.

Dated the 29th day of December, 1865.

In place of Rule 79 of the Rules and Orders in Non-Contentious Business, it is Ordered, That—

79. The Registrars are to take care that the copies of Wills and Affidavits to be annexed to the Probates or Letters of Administration are fairly and properly written, and are to reject those which are otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.

(Signed) JAMES PLAISTED WILDE.

Approved,
CRANWORTH, C.
A. E. COCKBURN.

RULES AND REGULATIONS FOR HER MAJESTY'S COURT FOR DIVORCE AND MATRIMONIAL CAUSES, MADE UNDER THE PROVISIONS OF

20 & 21 Vict. cap. 85.	25 & 26 Vict. cap. 81.
21 & 22 Vict. cap. 108.	27 & 28 Vict. cap. 44.
22 & 23 Vict. cap. 61.	and
23 & 24 Vict. cap. 144.	21 & 22 Vict. cap. 93.

Whereas by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided that the said Court shall make such rules and regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever theretofore exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary for Her Majesty's Court for Divorce and Matrimonial Causes, do revoke all rules and regulations heretofore made and issued concerning the practice and procedure in the said Court for Divorce and Matrimonial Causes, and do make the following rules and regulations in place thereof, to take effect on and after the 11th of January, 1866.

Dated the 26th day of December, 1865.

(Signed) JAMES PLAISTED WILDE.

All rules and regulations heretofore made and issued for Her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th day of January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in Her Majesty's Court for Divorce and Matrimonial Causes on and after the 11th day of January, 1866:—

Petitions.

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.—A form of Petition is given in the Appendix, No. 1.

2. Every petition shall be accompanied by an affidavit made by the Petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the petition.

3. In cases where the Petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the Petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the Petitioner and the other party to the marriage or alleged marriage.

Co-respondents.

4. Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made Co-respondents in the cause, unless the Judge Ordinary shall otherwise direct.

5. Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the Petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the Registrars to amend the petition by inserting such name therein, and the Registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "Respondent" where the same is hereinafter used shall include all Co-respondents so far as the same is applicable to them.

Citation.

8. Every Petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each Respondent in the cause.—A Form of Citation is given in the Appendix, No. 2.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney shall take it, together with a præcipe, to the Registry, and there deposit the præcipe, and get the citation

Matrimonial Rules 11th Jan. 1866 [P.D. 240] (1) Jeffreys v. Jeffreys, 2 Tr. 1 P. 90.
Rescinded & new rules substituted for same in June 1865 [1865 P.D. 475]

signed and sealed.—A Form of Præcipe is given in the Appendix, No. 3. The address given in the Præcipe must be within three miles of the General Post Office.

Service.

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court.

13. In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the Registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the Registry.—The Form of Certificate of Service is given in the Appendix, No. 4.

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the Registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a Petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the Respondents, or it must be shewn by affidavit, filed in the Registry, that they have been duly cited, and have not appeared.

18. An affidavit of service of a citation must be substantially in the form given in the Appendix, No. 5, and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

Appearance.

19. All appearances to citations are to be entered in the Registry in a book provided for that purpose.—The Form of Entry of Appearance is given in the Appendix, No. 6.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as hereinafter directed, or by leave of the Judge Ordinary, or of the Registrars in his absence, to be applied for by motion founded on affidavit.

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office.

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the Registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the Petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

Interveners.

23. Application for leave to intervene in any cause must be made to the Judge Ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge Ordinary.

Suits in formâ Pauperis.

25. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the Judge Ordinary; and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth 25*l.*, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to shew cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

Answer.

28. Each Respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the Registry an answer to the petition.—A Form of Answer is given in the Appendix, No. 7.

29. Each Respondent shall on the day he or she files an answer deliver a copy thereof to the Petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the Respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof, and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the Respondent who is husband or wife of the Petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the Deponent and the Petitioner.

Further Pleadings.

32. Within fourteen days from the filing and delivery of the answer the Petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

General Rules as to Pleadings.

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the Judge Ordinary, or of one of the Registrars in his absence, obtained on summons.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading shewing the alterations and amendments made therein shall be delivered to the opposite parties, on the day such alterations and amendments are made in the pleadings filed in the Registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the Judge Ordinary, or of one of the Registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the Judge Ordinary or Registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the Registrars in his absence, by summons and not by motion.

Service of Pleadings, &c.

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

Mode of Trial.

40. When the pleadings on being concluded have raised any questions of fact, the Petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in this Court, or in case the Petitioner should fail to do so at such time, either of the Respondents on whose behalf such questions have been raised may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

Questions of Fact for the Jury.

41. Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the Petitioner, and settled by one of the Registrars.—A Form is given in the Appendix, No. 8.

42. Should the Petitioner fail to prepare and deposit the questions for settlement in the Registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the Respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the Registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

Setting down the Cause for Trial or Hearing.

44. In cases to be tried by a jury, the Petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as finally settled in the Registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

45. In cases to be heard without a jury, the Petitioner shall, after obtaining directions as to the mode of hearing, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

46. If the Petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the Respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the Petitioner, and to each of the other parties to the cause for whom an appearance has been entered.

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the Registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct.

Trial or Hearing.

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit.

49. The Registrar shall enter in the Court Book the finding of the jury and the decree of the Court, and shall sign the same.

50. Either of the Respondents in the cause, after entering an appearance without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a Respondent, who is husband or wife of the Petitioner, may be heard also in respect to any question as to custody of children, but a Respondent

who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

Evidence taken by Affidavit.

51. When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the Registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge Ordinary, or of the Registrars in his absence.

55. Application for an order for the attendance of a Deponent for the purpose of being cross-examined in open Court shall be made to the Judge Ordinary, on summons.

Proceedings by Petition.

56. Any party to a cause who has entered an appearance may apply on summons to the Judge Ordinary, or in his absence to the Registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the Registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the Registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded.

59. A Form of Act on Petition, Answer, and Conclusion is given in the Appendix, No. 9.

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the Registry such affidavits and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month, any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge Ordinary without a jury.

New Trial and Hearing.

62. An application to the Judge Ordinary for a new trial of issues of fact tried by a jury, or for a re-hearing of a cause, may be made by motion within fourteen days from the day on which the issues were tried or the cause was heard, if the Judge Ordinary be then sitting to hear motions; if not, on the first day appointed for hearing motions in this Court after the expiration of the fourteen days.

Petition for reversal of Decree of Judicial Separation.

63. A petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the Petitioner relies.—A form of such Petition is given in the Appendix, No. 10.

64. Before such a petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the Registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition for judicial separation, and answer thereto, so far as such directions are applicable.

Demurrer.

67. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge Ordinary without a jury, unless the Judge Ordinary shall direct otherwise.

Intervention of the Queen's Proctor.

68. The Queen's Proctor shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition; and on the day he files his plea in the Registry shall deliver a copy thereof to the Petitioner, or to his proctor, solicitor, or attorney.

69. All subsequent pleadings and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause.

Showing Cause against a Decree.

70. Any person wishing to shew cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such decree nisi has been pronounced.

71. Every such person shall at the time of entering an appearance, or within fourteen days thereafter, file affidavits setting forth the facts upon which he relies.

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree nisi has been pronounced.

73. The party in the cause in whose favour the decree nisi has been pronounced may, within eight days after delivery of the affidavits, file affi-

davits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person shewing cause against the decree being made absolute.

74. The person shewing cause against the decree nisi being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree nisi.

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge Ordinary or of one of the Registrars in his absence.

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge Ordinary may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

Appeals to the full Court.

77. An appeal to the full Court from a decision of the Judge Ordinary must be asserted in writing, and the instrument of appeal filed in the Registry within the time allowed by law for appealing from such decision; and on the same day on which the appeal is filed, notice thereof, and a copy of the appeal, shall be delivered to each Respondent in the appeal, or to his or her proctor, solicitor, or attorney.—A Form of Instrument of Appeal is given in the Appendix, No. 11.

78. The appellant, within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge Ordinary, or by the Registrars in his absence, shall file in the Registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each Respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten days from the time of such filing and delivery, or from such further time as may be allowed for the purpose by the Judge Ordinary, or the Registrars in his absence, shall be at liberty to file in the Registry a case against the appeal, also in triplicate, and the Respondent shall on the same day deliver a copy thereof to the Appellant, or to his proctor, solicitor, or attorney.

79. After the expiration of ten days from the time when the Respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed.

Decree Absolute.

80. All applications to make absolute a decree nisi for dissolution of a marriage must be made to the Court by motion. In support of such applications it must be shewn by affidavit filed with the case for motion that search has been made in the proper books at the Registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to shew cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shewn by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree nisi.—A Form of Affidavit is given in the Appendix, No. 12.

Alimony.

81. The wife, being the Petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the Respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

83. A Form of a Petition for Alimony is given in the Appendix, No. 13.

84. The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being Respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition, for the purpose of being examined thereon.

87. In case the answer of the husband alleges that the wife has property of her own, she may, within eight days, file a reply on oath to that allegation; but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the Registrars in his absence.

88. A copy of every petition for alimony, answer, and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice.

90. No affidavits can be read or made use of as evidence in support of, or in opposition to, the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the Registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony: provided that she shall, eight days at least before

making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge Ordinary, or of the full Court on appeal, as the case may be.

94. Alimony, pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

Maintenance and Settlements.

95. Applications to the Court to exercise the authority given by sections 32 and 45 of 20 & 21 Vict. c. 85, and by section 5 of the 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the Judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under section 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree nisi has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the Registrars, who shall investigate the averments therein contained in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

102. The report of the Registrar shall be filed in the Registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the Registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the Registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge Ordinary.

Custody of and Access to Children.

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit.

Guardians to Minors.

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as Petitioner, Respondent, or Intervener in a cause.—The Form of an Instrument of Election is given in the Appendix, No. 14.

106. The necessary instrument of election must be filed in the Registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the Registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a Co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

Subpœnas.

109. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there get it signed and sealed, and deposit the præcipe.—Forms of Subpœna, Nos. 15 & 17, and Forms of Præcipe, Nos. 16 & 18, are given in the Appendix.

Writs of Attachment and other Writs.

110. Applications for writs of attachment, and also for writs of fieri facias and of sequestration,

(1) See Rules 17 April 77

must be made to the Judge Ordinary by motion in Court.

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the Registry, with an office copy of the order, and when approved and signed by one of the Registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge Ordinary or for other Judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge Ordinary if the Court be then sitting; if not, then to one of the Registrars, who for good cause shewn shall have power to order such discharge.

Notices.

113. All notices required by these Rules and Regulations, or by the practice of the Court, shall be in writing, and signed by the party, or by his or her proctor, solicitor, or attorney.

Service of Notices, &c.

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these Rules and Regulations are required to be given or delivered to the opposite parties in the cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the Petitioner and Respondent respectively.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the Registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge Ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the Commissioner or other person before whom the affidavit is sworn.

Office Copies, Extracts, &c.

118. The Registrars of the Principal Registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes; and all Rules and Orders, and fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the Registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial Causes, save that the length of copies and extracts shall in all cases be computed at the rate of 72 words per folio.

119. Office copies or extracts furnished from the Registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the Principal Registrars of the Court of Probate to be an examined copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

Time fixed by these Rules.

121. The Judge Ordinary shall in every case in which a time is fixed by these Rules and Regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the Registrars may, upon reasonable cause being shown, extend the time: provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in Chambers.

123. The time fixed by these Rules and Regulations for the performance of any act or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Protection Orders.

124. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in Chambers, and supported by affidavit.—A Form of Application is given in the Appendix, No. 19.

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

Bond not required.

126. On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

Change of Proctor, Solicitor, or Attorney.

127. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the Judge Ordinary, or to the Registrars in his absence.

128. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon

him, the party may, with the sanction and by order of the Judge Ordinary or of the Registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

Order for the immediate Examination of a Witness.

129. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court, is to be made to the Judge Ordinary, or to the Registrars in his absence, by summons, or if on behalf of a Petitioner proceeding in default of appearance of the parties cited in the cause without summons, before one of the Registrars, who will direct the order to issue, or refer the application to the Judge Ordinary, as he may think fit.

130. Such witness shall be examined vivâ voce, unless otherwise directed, before a person to be agreed upon by the parties in the cause or to be nominated by the Judge Ordinary, or by the Registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the Judge Ordinary or the Registrars to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for the Examination of Witnesses.

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a Petitioner proceeding in default of appearance without summons, before one of the Registrars, who will order such commission or requisition to issue, or refer the application to the Judge Ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by the Registrar, or for want of agreement to be nominated by the Registrar to whom the application is made.

134. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the Registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the Registrar shall make an order on such application, or refer the matter to the Judge Ordinary.—A form of a Commission and Requisition is given in the Appendix, No. 20.

135. Any of the parties to the cause may apply to one of the Registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the Registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge Ordinary.

136. After the issuing of a summons to shew cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the Registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the Registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the Registry, unless the Judge Ordinary or one of the Registrars in his absence shall otherwise direct.

Affidavits.

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

140. No affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shewn by the initials of the Registrar, Commissioner, or other authority before whom it was sworn.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the Registrar, Commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark or wrote his or her signature thereto in the presence of the Registrar, Commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the Rules and Regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

146. The above Rules and Regulations in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.

Cases for Motion.

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made; and, briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the Registry without permission of one of the Registrars.

149. On depositing the case in the Registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the Registry; or in case such affidavits or documents have been already filed or deposited in the Registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary.

150. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit, who are entitled to be heard in opposition thereto.

Taxing Bills of Costs.

151. All bills of costs are referred to the Registrars of the Principal Registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the Registry.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a Registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the Registrar.

Wife's Costs.

158. After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the Judge Ordinary, or of the Registrars in his absence, to be obtained on summons, a wife who has entered an appearance may file her bill of costs for taxation as against her husband, and the Registrar to whom such bill of costs is referred for taxation shall at the same time, if directions as to the mode of hearing or trial have been given, otherwise when the same are given, ascertain and report to the Court what is a sufficient sum of money to be paid into the Registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing or trial of the cause.—A Form of Bond for securing a Wife's Costs of Hearing or Trial of a Cause is given in the Appendix, No. 21.

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the Jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

Summonses.

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the Summons Book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and befor 7 o'clock P.M. On Saturdays, the copy of the summons is to be served before 2 o'clock P.M.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the Judge's Chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge Ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the Registrars in the Summons Book.

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge Ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar

W James L. J. P. & M. 333.

See first rules as to summons W.M.T.S. Ord. # 113.

the party taking out the summons from the right to go before the Judge Ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the orig inal summons, or the copy served on the party summoned, must be filed in the Registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the Registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary: provided that the order sought is in the opinion of the Registrar one which, under the circumstances, would be made by the Judge Ordinary.

168. The same Rules and Regulations shall, so far as applicable, be observed in respect to summonses which may be heard and disposed of by the Registrars.

Payment of Money out of Court.

169. Persons applying for payment of money out of Court are to bring into the Registry a notice in writing setting forth the day on which the money applied for was paid into the Registry, the minute entered in the Court books on receiving the same, the date and particulars of the order for payment to the applicant. In case the money applied for be in payment of costs, the notice must also set forth the date of filing the bill for taxation, and of the Registrar's certificate.

170. The above notice must be deposited in the Registry two clear days at least before the money is paid out, and is, in that interval, to be examined by one of the clerks of the Registry with the original entries in the Court books, and the bills of costs referred to in it, and certified by such clerk to be correct.

171. When the Court is not sitting, payment of money out of Court will be made only on such day or days of the week as may be fixed by the Registrars, notice whereof will be given in the Registry.

Registries and Officers.

172. The Registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the Registrars of the Principal Registry of the Court of Probate.

173. The Record Keepers, the Sealer, and other officers of the Principal Registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the Registry thereof, as they discharge in the Court of Probate and the Principal Registry thereof.

Proceedings under the "Legitimacy Declaration Act, 1858."

174. The above Rules and Regulations, as far as the same may be applicable, shall extend to applications and proceedings under the "Legitimacy Declaration Act," 1858.

TABLE OF FEES TO BE TAKEN IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Whereas by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided, that the said Court shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted, that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever theretofore exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do fix the fees set forth in the annexed Table to be payable upon proceedings in the said Court for Divorce and Matrimonial Causes on and after the 11th of January, 1866.

Dated the 11th of January, 1866.

(Signed) JAMES PLAISTED WILDE.

Citation.

	£	s.	d.
On every citation	0	5	0
For settling citation, or an abstract thereof for advertisement, or other advertisement:			
If five folios, or seventy-two words, or under	0	2	6
If above five folios, for each additional folio, or part of a folio	0	0	3

Appearance.

On entering appearance	0	2	6
On amending appearance	0	2	6

Pleadings.

Filing a petition	0	5	0
Filing an answer	0	5	0
Filing a reply	0	5	0
Filing rejoinder or any further application	0	5	0
Filing act on petition	0	5	0
Filing any writing to the act on petition by way of answer, reply, rejoinder, or conclusion	0	5	0
Filing rejoinder in demurrer	0	5	0
On amending or reforming pleadings	0	2	6

Evidence.

Filing interrogatories (each set)	0	5	0
Filing deposition of each witness	0	2	6

Protection Orders.

Filing application for an order for the protection of a wife's earnings and property	0	5	0
For entering the order on such application	0	5	0
For the order under seal of the Court	0	10	0

	£	s.	d.
Questions for Jury.			
For settling the issues of fact to be tried by a jury	0	10	0
Filing parchment copy of the issues of fact as settled	0	2	6
Filing panel	0	2	6
Setting down.			
Setting a cause down for hearing or trial	0	5	0
Withdrawal.			
On withdrawal of a cause after same is set down for hearing or trial, to be paid by the party at whose instance it is withdrawn	0	5	0
Subpœna.			
On every subpœna	0	2	6
Hearing or Trial.			
On the hearing or trial of a cause: From the party setting down the cause for hearing or trial	1	10	0
If the hearing or trial continues more than one day, for each day: From the same party	1	0	0
Judge's Notes.			
Producing the Judge's notes	0	5	0
Entering Decree, Verdict, or Order.			
Entering sentence or final decree in a cause, to be paid by the successful party	0	10	0
Entering verdict, if five folios of seventy-two words or under	0	5	0
If exceeding five folios, for each additional folio or part of a folio	0	1	0
Entering order for the examination of a witness or witnesses	0	5	0
Entering any decree or order for alimony	0	5	0
Entering order directing how damages shall be applied	0	5	0
Entering order providing for custody, maintenance, or education of children, if five folios of seventy-two words or under	0	5	0
Entering any order made under the authority given by 20 & 21 Vict. c. 85, sections 32 & 45, and by 22 & 23 Vict. c. 61, s. 5, if five folios of seventy-two words or under	0	5	0
If either of the above orders exceed five folios, for each additional folio or part of a folio	0	1	0
Entering any minute, order, or decree in the Court Book other than minutes, orders, or decrees specified	0	2	6
Entering any order of the Registrars of the Court of Probate, the same fee as would be payable for entering a similar order made by the Judge.			
Orders.			
For any order issuing under the hand of the Judge Ordinary or of one or more of the Registrars, except orders made on summons	0	5	0

	£	s.	d.
Bill of Exceptions.			
Bill of exceptions signed by the Judge	0	5	0
Commission or Requisition.			
On every commission or requisition issuing under seal of the Court	1	0	0
Taking Evidence.			
For taking the evidence of one or more witnesses before the Registrar, and within three miles of the General Post Office, for each day	3	3	0
If beyond that distance, for each day, in addition to travelling expenses	5	5	0
If for part of a day only, such smaller fee as the Registrar in his decision shall think proper.			
References to the Registrars.			
On each reference to ascertain the amount to be paid or secured to a wife to cover her costs. For the Registrar's attendance	0	5	0
For his report thereon	0	2	6
On each reference for any other inquiry before the Registrars. For Registrar's attendance	1	0	0
For every hour or part of hour after the first hour a further fee of	0	10	0
For the Registrar's report, if five folios of seventy-two words or under	0	5	0
If exceeding five folios, for every additional folio or part of a folio	0	2	0
Summonses.			
On each summons	0	2	6
For an order on summons, including the entry of same	0	2	6
If a final order in the cause	0	10	0
Motions.			
Filing case for motion	0	5	0
Entering any minute or order on motion other than order specified	0	5	0
If a final order in the cause	0	10	0
Writs.			
Writ of attachment	0	7	6
Writ of sequestration	1	0	0
Writ of fieri facias.	1	0	0
Appeals.			
On lodging instrument of appeal	0	10	0
Certificate.			
For every certificate under the hand of the Judge Ordinary, or of one of the Registrars of the Principal Registry of the Court of Probate	0	2	6
Filing.			
Filing every notice	0	1	0
Filing exhibits, for each exhibit	0	1	0
Filing every affidavit or other document brought into Court or deposited in the Registry for filing which no fee is before specified	0	2	6

Searches.

	£	s.	d.
Search in each Court Book, if within the last five years	0	1	0
If at an earlier period than within the last five years	0	2	6
In case the Court Books to be searched or the documents required are not in the Registry, in addition to the above	0	2	6

Office Copies and Extracts.

For every office copy or extract of a minute, order, or decree entered in a cause, or of any document filed in a cause, or deposited in the Registry:			
If five folios of seventy-two words or under	0	2	6
If exceding five folios of seventy-two words, per folio	0	0	6
If on parchment, in addition to the above, for every folio and part of a folio of seventy-two words	0	0	3
For the seal of the Court affixed to any minute, order, or decree, or to any office copy	0	5	0

Taxing Costs.

Taxing every bill of costs:			
If five folios of seventy-two words or under	0	2	6
If exceeding five folios of seventy-two words			
When taxed as between party and party, for every folio and part of a folio of seventy-two words	0	0	6
When taxed as between practitioner and client, for every folio and part of a folio of seventy-two words	0	1	0
For postponement of appointment for taxation of costs to be paid by the party at whose instance the appointment is postponed:			
If the bill of costs is five folios of seventy-two words or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0

Appointment of Officers.

On appointment of a Commissioner for taking oaths	1	0	0
For registering appointment of a Commissioner for taking oaths in the Court of Chancery	0	5	0

Oaths.

For administering an oath to each deponent	0	1	0
For marking each exhibit	0	1	0

APPENDIX.

FORMS

Which are to be followed as nearly as the circumstances of each case will allow.

No. 1.—PETITION.

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18 .

The petition of *A. B.*, of sheweth,—

1. That your petitioner was on the day of 18 lawfully married to *C.B.*, then *C.D.* [spinster *or* widow], at the *parish church of &c.*

[*Here state where the marriage took place.*]

2. That after his said marriage your petitioner lived and cohabited with his said wife at and at , and that your petitioner and his said wife have had issue of their said marriage three children; to wit:

[*Here state the names and ages of the children, issue of the marriage.*]

3. That on the day of 18 , and on other days between that day and , the said *C.B.*, at , in the county of , committed adultery with *R.S.*

4. That in and during the months of January, February, and March, 18 , the said *C.B.* frequently visited the said *R.S.* at , and on divers of such occasions committed adultery with the said *R.S.*

Your petitioner therefore humbly prays,—

That your Lordships will be pleased to decree:

[*Here set out the relief sought.*]

And that your petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

[*Petitioner's signature.*]

No. 2.—CITATION.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To *C.B.*, of in the county of .

Whereas *A.B.*, of *&c.*, claiming to have been lawfully married to , has filed petition against in our said Court, praying for , wherein alleges that you have been guilty of adultery [*or* have been guilty of cruelty towards the said *or as the case may be*]: Now THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do appear in our said Court, then and there to make answer to the said petition, a copy whereof, sealed with the seal of our said Court, is herewith served upon you. AND TAKE NOTICE, that in default of your so doing, our said Court will proceed to hear the said charge [*or* charges] proved in due course of law, and to pronounce sentence therein, your absence notwithstanding. And take further notice, that for the purpose aforesaid you are to attend in person, or by your proctor, solicitor, or attorney, at the Registry of our said Court in Doctors' Commons, London, and there to enter an appearance in a book provided for that purpose, without which you will not be allowed to address the Court, either in person or by counsel, at any stage of the proceedings in the case.

Dated at London the day of 18 , and in the year of our reign.

L.S. (Signed) *X.Y.*, Registrar.

No. 3.—PRÆCIPE FOR CITATION.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Citation for *A.B.*, of , against *C.B.*, of , to appear in a suit for by reason of .

(Signed) *A.B.* in person,
or
C.D., proctor, solicitor, *or* attorney for the said *A.B.*

[*Here insert the address required within three miles of the General Post Office.*]

No. 4.—CERTIFICATE OF SERVICE.

This citation was duly served by the undersigned *G.H.* on the within-named *C.B.*, of , at , on the day of , 18 .

(Signed) *G.H.*

No. 5.—AFFIDAVIT OF SERVICE OF CITATION.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

I, *C.D.*, of &c., make oath and say,—

That the citation, bearing date the day of , 18 , issued under seal of this Court against *C.B.*, the respondent [*or* co-respondent] in this cause, and now hereunto annexed, marked with the letter A, was duly served by me on the said *C.B.*, at , in the county of &c., by shewing to h the original under seal, and by leaving with h a true copy thereof, on the day of , 186 . And I further make oath and say that I did at the same time and place deliver to the said *C.B.* personally a certified copy, under seal of this Court, of the petition filed in this cause.

Sworn at &c., on the day of 18 . } Before me }

No. 6.—ENTRY OF AN APPEARANCE.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B., petitioner, against *C.B.*, respondent, and *E.F.*, co-respondent. } The respondent, *C.B.*, appears in person [*or C.D.*, the proctor, solicitor, *or* attorney for *C.B.*, the respondent (*or E.F.*, the co-respondent), appears for the said respondent *or* co-respondent.]

Entered this day of , 18 .

[*Here insert the address required within three miles of the General Post Office.*]

Entered this day of 18 .

No. 7.—ANSWER.

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

A.B. v. *C.B.*

The respondent, *C.B.*, by *C.D.*, her proctor, solicitor, *or* attorney [*or* in person], in answer to the petition filed in this cause, saith,—

1. That she denies that she committed adultery with *R.S.*, as set forth in the said petition:
2. Respondent further saith, that on the day of , 18 , and on other days between that day and , the said *A.B.*, at , in the county of , committed adultery with *K.L.*

[*In like manner respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.*]

Wherefore this respondent humbly prays,—

That your Lordship will be pleased to reject the prayer of the said petition, and decree, &c.

No. 8.—QUESTIONS OF FACT FOR THE JURY.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

Questions for the Jury.

1. Whether *C.B.*, the respondent, committed adultery with *E.F.*, the co-respondent.
2. Whether *A.B.*, the petitioner, has condoned the adultery committed by *C.B.*, the respondent (if any).
3. Whether *A.B.*, the petitioner, has been guilty of cruelty towards *C.B.*, the respondent.

[*Here set forth in the same form all the questions at issue between the parties.*]

4. What amount of damages should be paid by *E.F.*, the co-respondent, in respect of the adultery (if any) by him committed.

No. 9.—ACT ON PETITION.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

On the day of 18 .

A.B., the petitioner [*or C.D.*, the proctor, solicitor, *or* attorney of *A.B.*, the petitioner] alleged that

[*Here state briefly the facts and circumstances upon which the petition is founded.*]

Wherefore the said *A.B.*, or *C.D.*, referring to the affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that

[*Here set forth the prayer of the petition.*]

(Signed) *A.B.*
or
C.D.

Answer.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

On the day of 18 .

C.B., the respondent [*or G.H.*, the proctor, solicitor, *or* attorney of *C.B.*, the respondent], in answer to the allegations in the act on petition, bearing date the day of 186 , of *A.B.*, admitted [*or* denied] that

[*Here set forth any allegations admitted or denied.*]

And he alleged that

[*Here state any facts or circumstances in explanation or in answer.*]

Wherefore the said *C.B.*, or *G.H.*, referring to the affidavits and proofs to be by her exhibited in verification of what she so alleged, prayed

[*Here state the prayer of respondent.*]

(Signed) *C.B.*
or
G.H.

Conclusion.

A.B. against *C.B.* and *E.F.*

On the day of 18 .

A.B., the petitioner [*or C.D.*, the proctor, solicitor, *or* attorney for *A.B.*, the petitioner], in reply to the allegations of *C.B.* [*or G.H.*] in her answer, bearing date denied the same in great part to be true or relevant. Wherefore he alleged and prayed as before. (Signed) *A.B.*
or
C.D.

No. 10.—PETITION FOR REVERSAL OF DECREE.

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18 .

The petition of *A.B.*, of , sheweth,—

1. That your petitioner was on the day of 18 , lawfully married to *C.B.*, then *C.D.*, spinster [*or* widow], at the parish church of, &c.

[*Here state where the marriage took place.*]

2. That on the day of your Lordship, by your final decree, pronounced in a cause then depending in this Court, entitled *C.B.* against *A.B.*, decreed as follows; to wit:

[*Here set out the decree.*]

3. That the aforesaid decree was obtained in the absence of your petitioner, who was then residing at

[*State facts tending to shew that the petitioner did not know of the proceedings; and further, that had he known of them, he might have offered a sufficient defence.*]

or,

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife

[*Here state any legal grounds justifying the petitioner's separation from his wife.*]

Your petitioner therefore humbly prays,—

That your Lordship will be pleased to reverse the said decree.

No. 11.—APPEAL.

I, *A.B.*, the petitioner [*or C.D.*, the proctor, solicitor, *or* attorney of *A.B.*, the petitioner], in a suit lately depending in Her Majesty's Court for Divorce and Matrimonial Causes, entitled *A.B.* against *C.D.* and *E.F.*, do hereby, in due time and place, complain of and appeal against a certain order or decree

made in the said cause by the Right Honourable the Judge Ordinary of the said Court on the day of 18 . Whereby, amongst other things, the said Judge Ordinary did order and decree

[*Here set forth the whole of the decree, or such part of it as may be appealed against.*]

(Signed) *A.B.*
or
C.D.

This instrument of appeal was lodged in the Registry of Her Majesty's Court for Divorce and Matrimonial Causes this day of 18 .

[*To be signed by a clerk in the Registry.*]

No. 12.—AFFIDAVIT IN SUPPORT OF MOTION FOR DECREE ABSOLUTE.

In Her Majesty's Court for Divorce and Matrimonial Causes.
A.B. against *C.B.* and *E.F.*

I, *C.D.*, of &c., solicitor for *A.B.*, the petitioner in this cause, make oath and say, that on the day of 18 , I carefully searched the books kept in the Registry of this Court for the purpose of entering appearances from and including the day of 18 , the day of the date of the decree nisi made in this cause, to the day of 18 , and that during such period no appearance has been entered in the said books by Her Majesty's Procurator-General, or by or on behalf of any other person or persons whomsoever. And I further make oath and say, that I have also carefully searched the books kept in the said Registry for entering the minutes of proceedings had in this cause from and including the said day of 18 , to the day of 18 , and that no leave has been obtained by Her Majesty's Procurator-General, or by any other person or persons whomsoever, to intervene in this cause; and that no affidavit or affidavits, instruments, or other documents whatsoever, have been filed in this cause by Her Majesty's Procurator-General, or any other persons whomsoever, during such period, or at any other period during the dependence of this cause, in opposition to the said decree nisi being made absolute.

Sworn at &c., on the day of 18 . Before me }

No. 13.—PETITION FOR ALIMONY.

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*
The day of 18 .

The petition of *C.B.*, the lawful wife of *A.B.*, sheweth,—

1. That the said *A.B.* does now carry on, and has for many years past carried on, the business of a at , and from such business he derives the net annual income of £ :
2. That the said *A.B.* is now, or lately was, possessed of or entitled to proprietary shares of the Railway Company, amounting in value to £ , and yielding a clear annual dividend of £ :
3. That the said *A.B.* is possessed of certain stock-in-trade in his said business of a of the value of £

[*In same manner state particulars of any other property which the husband may possess.*]

Your petitioner therefore humbly prays,—

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony pendente lite [*or* permanent alimony] as to your Lordship shall seem meet.

No. 14.—ELECTION OF A GUARDIAN.

By a petitioner.

Whereas a suit is about to be instituted in Her Majesty's Court for Divorce and Matrimonial Causes on behalf of *A.B.* against *C.B.*, the wife of the said *A.B.* and *E.F.* And whereas the said *A.B.* is now a minor of the age of years and upwards, but under the age of 21 years, and therefore by law incapable of acting in his own name.

Now I, the said *A.B.*, do hereby make choice and elect *G.H.*, my natural and lawful father and next of kin, to be my curator or guardian for the purpose of instituting the said suit, and for the purpose of carrying on and prosecuting the same until a final decree shall be given and pronounced therein, or until I shall attain the age of 21 years, and I hereby appoint *C.D.*, of &c., my proctor [solicitor *or* attorney], to file, or cause to be filed, this my election for me in the Registry of the said Court,

In witness whereof I have hereunto set my hand and seal this day of , in the year 18 .

(Signed) *A.B.* (L.S.)

Signed, sealed, and delivered by the within-named *A.B.*, in the presence of
One attesting witness.

By a respondent.

Whereas a citation, bearing date the day of , 18 , has issued under seal of Her Majesty's Court for Divorce and Matrimonial Causes, at the instance of *A.B.*, claiming to have been lawfully married to *C.B.*, citing the said *C.B.* to appear in the said Court, and then and there to make answer to a certain petition of the said *A.B.*, filed in the said Court. And whereas the said *C.B.* is now a minor of the age of years and upwards, but under the age of 21 years, and therefore by law incapable of acting in her own name.

Now I, the said *C.B.*, do hereby make choice of and elect *G.H.*, my natural and lawful father and next of kin, to be my curator or guardian, for the purpose of entering an appearance for me and on my behalf in the said Court, and for the purpose of making answer for me to the said petition, and of defending me in the said cause, and to abide for me in judgment until a final decree shall be given and pronounced therein, or until I shall attain the age of 21 years, and I hereby appoint, &c.

No. 15.—SUBPŒNA AD TESTIFICANDUM.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [*names of all witnesses included in the subpœna to be inserted*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes, at Westminster, in our county of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in our said Court before our said Judge Ordinary, depending between *A.B.*, petitioner, and *C.B.*, respondent, and *E.F.*, co-respondent, on the part of the petitioner *or* respondent, *or* co-respondent [*or, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert the name of the judge*], at the Court for Divorce and Matrimonial Causes, the day of , 18 , in the year of our reign.

(Signed) *X.Y.*, Registrar.

No. 16.—PRÆCIPE FOR SUBPŒNA AD TESTIFICANDUM.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for [*insert witnesses' names*] to testify between *A.B.*, petitioner, *C.B.*, respondent, and *E.F.*, co-respondent, on the part of the petitioner [*or* respondent *or* co-respondent].

(Signed) { *A.B.* / *C.B.* / *E.F.* } *or* { *P.A.*, petitioner's [*or* respondent's *or* co-respondent's] proctor, solicitor, *or* attorney.

No. 17.—SUBPŒNA DUCES TECUM.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [*names of all parties included in the subpœna to be inserted*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes at Westminster, in our county of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c. required to be produced*], then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in our said Court before our said Judge Ordinary, depending between *A.B.*, petitioner, and *C.B.*, respondent, and *E.F.*, co-respondent, on the part of the petitioner [*or* the respondent *or* co-respondent, *as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert*

the name of the judge], at our Court for Divorce and Matrimonial Causes, the day of 18 , in the year of our reign.

(Signed) *X.Y.*, Registrar.

No. 18.—PRÆCIPE FOR SUBPŒNA DUCES TECUM.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for to testify and produce, *&c.* between *A.B.*, petitioner, *C.B.*, respondent, and *E.F.*, co-respondent, on the part of the petitioner [*or* respondent *or* co-respondent].

(Signed) $\left\{\begin{matrix}A.B.\\C.B.\\E.F.\end{matrix}\right\}$ *or* $\left\{\begin{matrix}P.A., \text{ petitioner's [}or\text{ respondent's}\\ or \text{ co-respondents's] proctor, solicitor, } or \text{ attorney.}\end{matrix}\right.$

No. 19.—APPLICATION FOR A PROTECTION ORDER.

To the Judge Ordinary of the Court for Divorce and Matrimonial Causes.

The application of *C.B.*, of , the lawful wife of *A.B.*, showeth,—

That on the day of she was lawfully married to *A.B.* at :

That she lived and cohabited with the said *A.B.* for years at , and also at , and hath had children, issue of her said marriage, of whom are now living with the applicant, and wholly dependent upon her earnings:

That on or about the said *A.B.*, without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her:

That since the desertion of her said husband the applicant hath maintained herself by her own industry, and hath thereby and otherwise acquired certain property [*or* hath become possessed of certain property], consisting of [*here state generally the nature of the property*].

Wherefore the said *C.B.* prays an order for the protection of her earnings and property acquired since the said day of , from the said *A.B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

No. 20.—COMMISSION OR REQUISITION FOR EXAMINATION OF WITNESSES.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*here set forth the name and proper description of the Commissioner*], greeting. Whereas a certain cause is now depending in our Court for Divorce and Matrimonial Causes between *A.B.*, petitioner, and *C.B.*, respondent, and *E.F.*, co-respondent, wherein the said *A.B.* has filed his petition praying for a dissolution of his marriage with the said *C.B.* [*or otherwise as in the prayer of the petition*]. And whereas, by an order made in the said cause on the day of 18 , on the application of the said *A.B.* it was ordered that a commission [*or* requisition] should issue under seal of our said Court for the examination of [*here insert name and address of one of the persons to be examined*], and others as witnesses to be produced on the part of the said *A.B.*, the petitioner, in support of his said petition (saving all just exceptions). Now know ye that we do by virtue of this commission [*or* requisition] to you directed, authorize [*or* request] you within thirty days after the receipt of this commission [*or* requisition] at a certain time and place to be by you appointed for that purpose, with power of adjournment to such other time and place as you shall seem convenient, to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them by you touching the matters set forth in the said petition (a true and authentic copy whereof, sealed with the seal of our said Court, is hereunto annexed), and such oath being administered, we do hereby authorize [*or* request] and empower you to take the examination of the said witnesses, touching the matters set forth in the said petition, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid and subscribed by you, we do require [*or* request] you forthwith to transmit the said examination, closely sealed up, to the Registry of our said Court in Doctors' Commons, in the City of London, together with these presents. And we do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful, and expedient for the due execution of this our commission [*or* requisition].

Dated at London the day of in the year of our Lord One thousand eight hundred and , and in the year of our reign.

(Signed) *X.Y.*, Registrar.

No. 21.—BOND FOR SECURING WIFE'S COSTS.

Know all men by these presents that we, *A.B.*, of *&c.*, *G.H.* of *&c.*, and *K.L.*, of *&c.*, are held and firmly bound unto *X.Y.*, one of the registrars of the Principal Registry of Her Majesty's Court of Probate, in the penal sum of pounds of good and lawful money of Great Britain, to be paid to the said *X.Y.*, and for which payment to be well and truly made we bind ourselves and each of us for the whole, our heirs, executors, or administrators firmly by these presents. Sealed with our seals.

Dated the day of in the year of our Lord, 18 .

Whereas a certain cause is now depending in Her Majesty's Court for Divorce and Matrimonial Causes between *A.B.*, petitioner of the one part, and *C.B.*, respondent, and *E.F.*, co-respondent, of the other part. And whereas *X.Y.*, one of the registrars of Her Majesty's Court of Probate, has by a report under his hand, made in the said cause on the day of 18 , reported to the Court that pounds was a sufficient sum to be paid into the Registry of the Court of Probate to cover the costs of the said respondent [*or* petitioner] of and incidental to the hearing of the said cause [*or otherwise as in the registrar's report*], or that a bond under the hand and seal of the said *A.B.*, and of two sufficient sureties in the penal sum of pounds, conditioned for the payment of such costs of the said *C.B.* as shall be certified to be due and payable by the said *A.B.*, not exceeding the said sum of pounds [*or otherwise as in report*], with hours' notice of such sureties to the proctor [solicitor *or* attorney] of the said *C.B.*, was a sufficient security to be given for the costs aforesaid. Now the condition of this obligation is such that if the above-bounden *A.B.*, his heirs, executors, or administrators shall well and truly pay or cause to be paid to the above-named *X.Y.*, his heirs, executors, administrators, or assigns the full sum of of good and lawful money of Great Britain, or the lawful costs of the said *C.B.*, the respondent [*or* petitioner] of and incidental to the hearing and trial of this cause [*or otherwise as in report*] to the extent of pounds, then this obligation is to be void and of none effect; otherwise to remain in full force and virtue.

Sealed and delivered by the said *A.B.*, *G.H.*, and *K.L.*, in the presence of *One attesting witness.*

A.B. (L.S.)
G.H. (L.S.)
K.L. (L.S.)

THE JUDGES' CHAMBERS, Dec. 30, 1865.

NOTICE.—The Following Regulations as to Stamps on the transaction of business at these Chambers will be strictly observed on and after the 1st day of January, 1866:—

The following Documents, before being presented to, or left with the Judges' Clerks, must have the proper Stamp or Stamps affixed thereon or thereto, as the rate of fee, viz.:—

	£	s.	d.
Every Affidavit left or filed in support of ex parte applications	0	1	0
„ Affidavit intended to be used, or read, or referred to prior to the application being heard before the Judge	0	1	0
„ Affidavit before being tendered to be sworn or affirmed (each deponent)	0	1	0
„ Exhibit (requiring signature of Judge or Commissioner)	0	1	0
„ Special or Appeal Case, Demurrer or Error Book, Certificate, Fiat, Caveat, &c.	0	5	0
„ *Bail on Cepi Corpus Error, &c.	0	2	0
„ *Recognizance (on Bond, Newspaper, and the like)	0	10	0
„ *Acknowledgment by Married Women, every acknowledgment	0	10	0
„ *Fiat for allowance of costs in Actions under £20 where Judgment is signed by default for want of appearance	0	2	0

* As to these documents, "The Stamp to be affixed upon a præcipe paper."

SUMMONS TO BE ATTENDED BY COUNSEL.

	£	s.	d.
Prior to the same being heard, the Stamp must be affixed on the original or copy Summons by the party giving the notice, and if opposed by Counsel, the party opposing must affix a similar Stamp on the original or copy served . .	0	5	0

As to the following documents, the parties applying for the same must be prepared with the necessary stamp or stamps to affix thereon as the rate of fee, viz.:—

Every Summons for Writ of Trial. . . .	0	1	0
„ other Summons	0	2	0
„ Order for Writ of Trial	0	1	0
„ Order of an Ordinary Nature . . .	0	2	0
„ Order of a Special Nature	0	5	0
„ Admission of an Attorney	1	0	0
„ Approbation for Commission to take Affidavits	0	2	6
„ Commission for taking Affidavits or Special Bail, exclusive of Stamp duty . . .	1	0	0
„ Office Copy Affidavit, or other proceeding, per folio.	0	0	6

N.B.—These lists do not include all the Fees receivable at the Judges' Chambers, but only such as are of daily occurrence.

ADDITIONAL RULES AND REGULATIONS FOR HER MAJESTY'S COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Whereas by an Act passed in the session of Parliament holden in the twentieth and twenty-first years of the reign of her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes:" and whereas by the said Act it is further provided that the said Court shall make such rules and regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same; and whereas by another Act passed in the session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever theretofore exercised by the full Court.

Now I, the Right Honourable Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do make the following additional rules and regulations concerning the practice and procedure in the said Court for Divorce and Matrimonial Causes, to take effect on and after the 1st day of March in the present year.

Dated the 30th day of January, 1869.

James Plaisted Wilde.

ADDITIONAL RULES AND REGULATIONS.

Restitution of Conjugal Rights.

175. The affidavit filed with the petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith, such cohabitation and restitution of conjugal rights has been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights, the respondent may apply by summons to the judge, or to the registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner.

As to Costs.

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid, may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the Judge Ordinary shall, for cause shewn, direct a more speedy taxation.

178. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order, by attachment on the party himself], and if the costs be not paid within the seven days, a writ of *fieri facias*, or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order, and non-payment.

As to Subpœnas.

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness. Such subpœna shall be in the following form:—

Subpœna ad testificandum.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [*names of all witnesses included in the subpœna to be inserted*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes at Westminster, in our county of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day, whenever our said Court is sitting, until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in our said Court, before our said Judge Ordinary, depending between *A. B.*, petitioner, and *C. B.*, respondent, and *E. F.*, co-respondent, on the part of the petitioner [*or* respondent, *or* co-respondent, *or, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert the name of the Judge*], at the Court for Divorce and Matrimonial Causes, the day of 18 , in the year of our reign.

(Signed) *X. Y.*, Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

Subpœna duces tecum.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [*names of all parties included in the subpœna to be inserted*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes, at Westminster, in our county of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day, whenever our said Court is sitting, until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c., required to be produced*], then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in our said Court, before our said Judge Ordinary, depending between *A.B.*, petitioner, and *C.B.*, respondent, and *E. F.*, co-respondent, on the part of the petitioner [*or* the respondent, *or* co-respondent, *as the case may be*], and on the aforesaid day between the parties aforesaid te be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert the name of the judge*], at our Court for Divorce and Matrimonial Causes, the day of 18 , in the year of our reign.

(Signed) *X.Y.*, Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

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2. —— *Will of Bastard— Grant to the Crown save and except—Right of Legatees to Grant with Will annexed—Practice.*] Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant save and except, or to a cæterorum grant, but not to a general grant of administration, and the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will. In the Goods of Rhoades - - - - - 119

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2. —— *Partnership Business.*] Where the estate of a deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the Court will not appoint an administrator pendente lite against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business. Horrell *v.* Witts 103

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3. —— *Residuary Legatee and Creditor*—20 & 21 *Vict. c.* 77, *s.* 73.] The Court will not exercise the power conferred on it by the 73rd section of the 20 & 21 Vict. c. 77, by passing over a person entitled to a grant of administration in favour of a creditor when the fact of the insolvency of the intestate is disputed. Hawke *v.* Wedderburne - - - - - 594

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ADMINISTRATION TO CREDITOR—*continued.*
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ADMINISTRATION WITH WILL ANNEXED—*continued.*
executor according to the tenor. Being satisfied that the testator intended to deprive the widow, who was primarily entitled to the grant, of any control over the administration of the estate, the Court decreed administration with the will annexed to the trustee under s. 73 of the 20 & 21 Vict. c. 77. In the Goods of Cosnahan - 183

2. —— *Married Woman—Refusal of Husband to execute Bond—Grant to Attorney of Married Woman—20 & 21 Vict. c. 77, s. 73.*] A married woman was the only legatee of a will which contained no appointment of an executor. Her husband refused to consent to her taking the grant of administration with the will annexed, or to join in the bond. The property being left to her separate use, the Court made the grant to her attorney without the husband's consent. In the Goods of Warren - - - - 538

3. —— *20 & 21 Vict. c. 77, s. 73—Residuary Legatee a Married Woman—Residue Part of her separate Estate—Grant to her Nominee without Notice to her Husband.*] Administration, with the will annexed, granted (under the 73rd section of the 20 & 21 Vict. c. 77) to the nominees of the residuary legatee, who was a married woman, without notice to her husband, the residue being settled to her separate use and at her absolute disposal. In the Goods of Pine - - 388

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—— Judicial separation—Order to attend at hearing - - - - 629
See Order to Attend at Hearing.

—— Misconduct—Intervention—Costs - 531
See Intervention.

ADULTERY—*continued.*
—— Misconduct of wife—Cruelty—Practice 219
See Misconduct of Wife. 2.
—— Petitioner and respondent guilty 572, 644
See Discretion of Court.
Verdict of Jury.
—— Person unknown - - - 464
See Adultery with Person Unknown.
—— Previous decree of judicial separation for cruelty—Subsequent adultery - 237
See Cruelty of Husband. 6.

ADULTERY WITH PERSON UNKNOWN—*Dissolution of Marriage—Practice—Leave to Proceed without Co-Respondent*— 20 & 21 *Vict. c.* 85, *s.* 28—*Rules* 4, 5, *and* 6.] When a petition charges adultery with a person unknown, and names no adulterer, it is necessary to obtain the leave of the Court to proceed without making a co-respondent. Pitt *v.* Pitt - - - - 464

AFFIDAVIT—Agent—Practice—Executor abroad
See Executor Abroad. [598
—— Practice—Declaration on oath - 138
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—— Proof of bigamy - - - 259
See Proof of Bigamy by Affidavit.

AFFIDAVIT TO LEAD—Citation—Applicant abroad - - - - 596
See Citation.

AFFIDAVIT VERIFYING PETITION—*Practice—Heading of Affidavit.*] The affidavit verifying a petition must not be headed in a cause, but "In the matter of the Petition of ——." Steed *v.* Steed - - - - - - 364

AGENT—Affidavit—Practice - - 598
See Executor Abroad.
—— Citation—Practice - - - 596
See Citation.

AGREEMENT—Revocation—Testamentary paper
See Testamentary Paper. 1. [384

ALIMONY—Lien—Attorney - - 254
See Lien on Alimony.

ALIMONY PENDENTE LITE—Alimony will be allotted on the average annual earnings of a husband, although at the moment when his answer to the petition for alimony is sworn he may be temporarily out of employment.—Where the husband and wife have been living apart for many years before the institution of the suit, and the wife has supported herself during the separation and is still able to do so, alimony pendente lite will not be allotted. Thompson *v.* Thompson and Johnson. Burrows *v.* Burrows. George *v.* George - 553

2. —— *Fund in the Wife's Possession.*] Where the husband's income did not exceed 60*l.* a year, and the wife had a sum of 70*l.* in her possession at the commencement of the suit, the Court refused to make an allotment of alimony pendente lite. Coombs *v.* Coombs - - 218

3. —— *Respondent supported by co-Respondent.*] A respondent is not entitled to alimony whilst she is living with the co-respondent as his wife, and supported by him. Holt *v.* Holt - - 610

4. —— *Wife found Guilty of Adultery—Delay—Refusal.*] The Court refused to make any order for alimony pendente lite, after a decree nisi had been obtained for a dissolution of marriage by reason of the wife's adultery, the wife having allowed some months to elapse after the commencement of the suit before she filed her petition for alimony. Noblett *v.* Noblett and Kershaw - 651

ALIMONY PENDENTE LITE—*continued.*
—— Pleading—Statement of average income 370
See Insufficient Answer.
—— Intervention of Queen's Proctor—Costs 96
See Intervention of Queen's Proctor. 1.
—— Practice—Examination of husband - 35
See Attachment for non-Attendance.

ALIMONY, PERMANENT—*Proportion of Income.*] In allotting permanent alimony the Court will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than the wife, and when that is the case will not allow her the usual proportion of such income. Louis *v.* Louis. [230

2. —— *Settled Property belonging to Wife—Rate of Allowance—Judicial Separation*—20 & 21 *Vict. c.* 85, *s.* 22.] The Court is bound by the practice of the Ecclesiastical Courts in allotting permanent alimony after a decree of judicial separation. According to the practice of the Ecclesiastical Courts, the Court is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement. Haigh *v.* Haigh - - - - - 709

3. —— *Sequestration—Rent-Charge.*] The Court had made an order on the respondent for payment of permanent alimony at the rate of 110*l.* per annum, so long as he was in receipt of a rent-charge of 400*l.* per annum (his only source of income), the trustees of which had a discretionary power to refuse payment, in which event it enured to the benefit of the tenant for life. The respondent had prior to the date of the order become a bankrupt, but the trustees had nevertheless continued to pay to him the rent-charge, and he had failed to comply with the order of the Court.—The Court (the respondent and trustees opposing) directed a sequestration in general terms to issue against the property, &c., of the respondent. Clinton *v.* Clinton - - - - 215
—— Practice—Examination of husband - 512
See Examination of Husband.

ALLOWANCE TO WIFE—Alimony pendente lite—Collusion - - - - 505
See Collusion. 2.

ALTERATION OF DATE—Probate—Endorsement
See Wrong Date. 664

ALTERATION OF PLEADING—*Costs—Discontinuance of Contentious Proceedings.*] A plaintiff propounded a will in a declaration in the ordinary form, to which the defendant pleaded. The plaintiff then filed a second declaration in a special form, propounding the will as an American will. To this declaration the defendant pleaded, and evidence was taken on the questions raised by the pleadings under a requisition and commissions in America. Before the case came on for trial, the plaintiff amended his declaration by reverting to the case which he had originally set up, whereupon the defendant abandoned his opposition and consented to probate.—The Court condemned the defendant in the costs of proving the will in

ALTERATION OF PLEADING—*continued.*
solemn form, as if the suit had proceeded upon the original declaration, and made no order as to the costs caused by the filing of the second declaration. ARCHER *v.* BURKE - - - 558

AMBIGUITY—Will—Mistake - - 8
See MISTAKE IN WILL. 1.

AMENDMENT — Practice — Revocation of will
See REVOCATION OF WILL. 4. [6

—— Practice—Testamentary suit - - 583
See LIS ALIBI PENDENS.

ANSWER — Alimony — Statement of income—Practice - - - - 370
See INSUFFICIENT ANSWER.

ANSWER ALLEGING ADULTERY OF PETITIONER — *Pleading — Demurrer — Finding of Adultery against Petitioner in a previous Suit.*] The Queen's Proctor, intervening in a suit for dissolution of marriage, alleged in his answer, 1 and 2, collusion; 3, that in a previous suit by the petitioner against the respondent, the Court found that the petitioner had committed adultery, and dismissed his petition; 4, adultery of the petitioner; demurrer to the third paragraph of the answer.—*Quære*, whether the finding in the previous suit is admissible as evidence of the petitioner's adultery, and, if admissible, whether it is conclusive:—*Held*, that, whether admissible for that purpose or not, it is a material fact for the consideration of the Court.—Demurrer overruled. CONRADI *v.* CONRADI - - - - 391

ANSWER ALLEGING DESERTION — Judicial separation—Withdrawal of petition 466
See WITHDRAWAL OF PETITION.

APPEAL—Decree of House of Lords—Practice
See DECREE OF HOUSE OF LORDS. [293

—— Order for permanent provision - - 78
See ORDER FOR PERMANENT PROVISION.

APPEAL FROM DIVORCE COURT — *Dissolution of Marriage — Plea — Invalidity of Marriage — Demurrer—Appeal.*] A demurrer to part of an answer to a petition for dissolution of marriage which put in issue the validity of the marriage, the other parts of the answer remaining to be determined, is not a final but an interlocutory matter, and one which under the first Divorce Act fell within the cognizance of the Judge Ordinary sitting alone, and his judgment on such demurrer is the subject of appeal to the full Court and not to the House of Lords.—Where the judgment on a demurrer from the state of the pleadings decides the whole suit, the appeal lies direct to the House of Lords. PAGANI *v.* PAGANI [223

APPOINTMENT — Power — Married woman — Dissolution of marriage - - 587
See GUARDIAN OF INFANT. 2.

—— Power—Will—Married woman: *See* WILL OF MARRIED WOMAN.
WILL UNDER POWER.

APPOINTMENT OF EXECUTOR—*Executors not named in Will.*] A testatrix executed a will containing these words:—"I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided, but not naming an executor. Beneath the signature of the testatrix, and opposite

APPOINTMENT OF EXECUTOR—*continued.*
the names of the attesting witnesses, were the words "executors and witnesses."—The Court held that there was no appointment of executors. IN THE GOODS OF WOODS - - - 556

2. —— *Petition—Receiver of Real Estate*—20 & 21 *Vict. c.* 77, *s.* 71—*Practice.*] The Court has no jurisdiction to appoint a receiver of the real estate of a deceased when the only litigation is by petition in reference to the individual appointed executor, and there is no suit pending touching the validity of the will. GRANT *v.* GRANT - 654

3. —— *Substituted Executor.*] An appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, *held* to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the will arose.—A. was in England at the time of the testator's death, but was absent on foreign service in her Majesty's navy when the application for probate was made, and was likely to be absent for some years, and probate was granted to B. IN THE GOODS OF LANGFORD - - - - - 458

—— Revocation - - - - 628
See REVOCATION OF APPOINTMENT OF EXECUTORS.

—— Will of realty only - - 325, 555
See WILL OF REALTY ONLY. 1, 2.

ASSIGNEES—Trial of issues—Practice - 89
See TRIAL OF ISSUES AT ASSIZES.

ASSIGNMENT—Administration bond - 186
See ADMINISTRATION BOND. 4.

ASSIGNMENT OF GUARDIANS—Lunatic—Nullity of marriage - - - 335
See NULLITY OF MARRIAGE. 4.

ATTACHMENT—Citation to take probate—Practice - - - - - 592
See EXECUTOR INTERMEDDLING.

—— Order for inspection of person—Refusal to submit - - - - 639
See NULLITY OF MARRIAGE. 7.

—— Practice—Mistake in spelling name - 485
See MISTAKE IN SPELLING NAME.

ATTACHMENT FOR NON-ATTENDANCE — *Alimony — Practice — Rule* 11 — *Examination of Husband in support of Petition for Alimony—Subpœna.*] A husband, who had filed no answer to his wife's petition for alimony, was subpœnaed by her to attend at the hearing, and to be examined in support of the petition. He did not answer to his subpœna, and on the service being proved, the Court made an order that he should attend on the next motion day, and that an attachment should issue in the event of his non-attendance. JENNINGS *v.* JENNINGS - - - - - 35

ATTESTATION—Administration bond - 301
See ADMINISTRATION BOND. 2.

—— Will—Signature of witness - 143, 269
See EXECUTION OF WILL. 2, 7.

ATTESTATION CLAUSE—Signature—Execution of will - - - 653, 661
See SIGNATURE IN ATTESTATION CLAUSE.
SIGNATURE UNDER ATTESTATION CLAUSE.

ATTESTING WITNESS—*Evidence—Discrediting adverse Witness.*] A party propounding a will is

ATTESTING WITNESS—*continued.*
bound to call one at least of the attesting witnesses, if he can be produced, to prove the due execution, and if such witness fails to prove the due execution he is bound to call the other, although he may know him to be an adverse witness. If an attesting witness called by a party propounding a will gives evidence against the will, the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he has denied having made such statements and he is not a hostile witness. COLES *v.* COLES AND BROWN - - - - 70
—— Evidence—Execution of will - - 362
See EXECUTION OF WILL. 4.
—— Residuary legatee - - - 277
See EXECUTION OF WILL. 9.
—— Will—Execution—Signature - - 143
See EXECUTION OF WILL. 2.
ATTORNEY OF MARRIED WOMAN—Administration - - - - - 538
See ADMINISTRATION WITH WILL ANNEXED. 2.

BANKRUPTCY—Order to pay damages and costs—Discharge - - - 467
See ORDER TO PAY DAMAGES AND COSTS.
BASTARD—Administration—Grant to Crown 15, [119
See ADMINISTRATION OF BASTARD'S ESTATE. 1, 2.
BELGIAN DOMICILE—Scotch marriage—Remarriage - - - - 487
See SCOTCH MARRIAGE.
BIGAMY—Evidence—Proof by affidavit - 259
See PROOF OF BIGAMY BY AFFIDAVIT.
BOND, ADMINISTRATION: *See* ADMINISTRATION BOND.

CASES—*Alexander, In the Goods of* (29 L. J. (P. M. & D.) 93) followed - - 90
See WILL OF MARRIED WOMAN. 3.
—— *Cartlidge* v. *Cartlidge* (2 Sw. & Tr. 567; 31 L. J. (P. M. & D.) 85) discussed 463
See CUSTODY OF CHILDREN PENDING SUIT.
—— *Dickinson* v. *Swatman* (30 L. J (P. M. & A.) 84) discussed - - - 209
See REVOCATION OF WILL. 2.
CÆTERORUM GRANT—Will of married woman
See WILL OF MARRIED WOMAN. 1. [156
CHAIN OF EXECUTORS—*Probate of Will of First Deceased granted in Ireland—No grant in England—Probate of Will of Second Deceased granted in Ireland—Re-sealed in England—Practice.*] The deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the Prerogative Court of Armagh, Ireland, but no grant was made in this country. The will of the sole executor of the husband was also proved in Ireland, but was re-sealed in London:—*Held*, that the executor under the last mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of the deceased. IN THE GOODS OF GAYNOR - - - - - 723
CHANCERY—Receiver—Administration pendente lite - - - - - 730
See ADMINISTRATION PENDENTE LITE. 1.
CHANGE OF DOMICILE—*Change from Portuguese Domicile—Education in England—Lunatic from his Majority—Dependent on Father's Domicile—Consular Office—Interest Suit.*] If a man at the time he attains his majority is of unsound mind and remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son.—The mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country. But, if one already domiciled and resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicile. SHARPE *v.* CRISPIN - - - - - 611
CHARGE OF CRUELTY NOT PROVED—*Costs of Wife—Judicial Separation.*] A wife having failed to establish a charge of cruelty, her petition for judicial separation was dismissed. As she had a larger separate income than the income of the husband, and as the Court was of opinion that the suit had been improperly instituted, an order for the payment of her costs of the hearing, under the 159th rule, was refused, although they had been taxed, and security for the amount had been deposited in the registry. HEAL *v.* HEAL - 300
CHILDREN—Access—Judicial separation 167
See ACCESS TO CHILDREN.
—— Administration to guardian - - 51
See ADMINISTRATION TO GUARDIAN.
—— Custody: *See* CUSTODY OF CHILDREN. CUSTODY OF CHILDREN PENDING SUIT.
—— Guardian - - - - 245, 587
See GUARDIAN OF INFANT. 1, 2.
—— Guardian ad litem - - 328, 690
See LEGITIMACY. 3. GUARDIAN AD LITEM.

CITATION—*Affidavit to Lead—Applicant abroad—Agent—Practice.*] A party interested in the property of the deceased, who desired to call in the probate of his will, and to put the executors to the proof thereof, resided in Tasmania.—The Court, on an affidavit that the estate of the deceased was about to be distributed by the Court of Chancery amongst those who claimed it under the will, allowed a citation to issue on an affidavit from the person authorized by a power of attorney to institute the suit on behalf of the party interested. IN THE GOODS of HUTLEY - 596
—— Guardian ad litem - - - 690
See GUARDIAN AD LITEM.
—— Indorsement of service - - - 26
See INDORSEMENT OF SERVICE ON CITATION.
—— Mistake in spelling name—Practice 485
See MISTAKE IN SPELLING NAME.
—— Probate—Practice - - - 592
See EXECUTOR INTERMEDDLING.

CITATION OF HEIR AT LAW—*Will—Practice—Proof in solemn Form—20 & 21 Vict. c. 77, s. 61.*] The Court will not allow an heir at law, or devisee, to be cited under the 61st section of the 20 & 21 Vict. c. 77, unless all the next of kin have been cited by the party propounding the will, or unless those who have been cited have filed pleas contesting the validity of the will. MOORE *v.* HOLGATE [101

2. —— *Will—Practice—Proof in solemn form—20 & 21 Vict. c. 77, s. 61.*] Where, in a suit commenced by caveat, the party propounding a will wishes to cite the heir at law under the 61st section of the 20 & 21 Vict. c. 77, before pleas have been filed contesting the validity of the will, he must make an affidavit that he intends to proceed and prove the will in solemn form. PEACOCK *v.* LOWE - - - - - - 311

CITATION TO TAKE ADMINISTRATION—*Creditor—Statute of Limitations.*] A creditor was allowed to cite the next of kin to accept administration, or shew cause why it should not be granted to the applicant, although his right of action was barred by the Statute of Limitations. IN THE GOODS OF COOMBS - - - - - - 193

CODICIL—Insertion of clause—Probate—Mistake [109

See INSERTION OF CLAUSE IN CODICIL.

—— Republication of will - - - 201

See REPUBLICATION OF WILL.

—— Revival of revoked will - - - 575

See REVIVAL OF REVOKED WILL.

—— Revocation of will - - - 636

See REVOCATION OF WILL. 1.

—— Testamentary paper — Revocation of codicil

See TESTAMENTARY PAPER. 2. [685

CODICIL INDEPENDENT OF WILL—*Will—Codicil—Will lost or revoked.*] Where a will and codicil have been in existence, and the will has been revoked, the Court will not grant probate of the codicil unless it is satisfied that the testator intended it to operate separately from the will. A testator by a testamentary paper, purporting to be a codicil to his last will and testament, bequeathed his balance at his bankers to his wife. No will could be found, although a will was proved to have been in existence, and in the testator's possession previous to the date of the codicil.—The Court was of opinion, looking at the provisions of the codicil, that the testator intended it to be independent of the will, and therefore admitted it to probate until such time as the will should be found. IN THE GOODS OF GREIG - - 72

COLLUSION—*Dissolution of Marriage—20 & 21 Vict. c. 85, s. 30—Dismissal of Petition—Wife's Costs.*] On the hearing of a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with desertion, it was shown that the adultery charged and proved was committed by the husband in fulfilment of a promise previously made by him to the wife that he would give her an opportunity of obtaining a divorce; that the adultery had been committed in order that it might be proved; that evidence of it had been obtained by means of information supplied to the wife by the husband; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him:—*Held*, that the husband and wife were guilty of collusion within s. 30 of 20 & 21 Vict. c. 85.—The husband was ordered to pay the costs of the wife, although her petition for dissolution was dismissed on the ground that they had been guilty of collusion. TODD *v.* TODD - - 121

COLLUSION—*continued.*

2. —— *Payment of Allowance to Wife in lieu of Alimony pendente lite—Suppression of Material Facts—Costs—23 & 24 Vict. c. 144, s. 7.*] The fact that a husband makes his wife an allowance in lieu of alimony whilst a divorce suit is pending is not of itself proof of collusion. But evidence that a husband had several interviews with his wife both before and after he presented a petition for dissolution, and at these interviews gave her money, and urged her not to oppose the petition, and promised that if she did not he would do no harm to the co-respondent, and would be a friend to her when the decree was obtained, was held to prove collusion, the respondent and the co-respondent not having appeared at the hearing, and material facts shewing that the petitioner had by his conduct conduced to the respondent's adultery having been withheld from the Court.—A petitioner having been found guilty of collusion, and the suppression of material facts, the decree nisi which he had obtained was rescinded, and the petition was dismissed, but, having incurred expense in preparing to meet a charge of adultery which was withdrawn, he was not condemned in the costs of the intervention. BARNES *v.* BARNES - 505

—— Separation—Adultery - - - 734

See CONNIVANCE.

COMMISSION TO EXAMINE WITNESS—*Testamentary Suit—Witness not in a precarious state of health, or about to go abroad—1 Wm. 4, c. 22—20 & 21 Vict. c. 77, s. 32.*] The Court directed a commission to issue for the examination of the surviving attesting witness to a will, which was in litigation before it, although the affidavit filed to support the application merely stated that the witness was upwards of sixty-six years of age, and frequently suffered from ill health. BROWN *v.* BROWN - - - - - - 720

—— Practice—Legitimacy Declaration Act, 1858

See LEGITIMACY. 2. [23

CONDITION—Testamentary paper - - 717

See TESTAMENTARY PAPER. 3.

—— Will - - - - 88, 380

See WILL ON CONTINGENCY. 1, 2.

CONDITIONAL NOTICE—Rule 41—Costs - 542

See NOTICE UNDER RULE 41.

CONDUCT CONDUCING TO ADULTERY—*Dissolution of Marriage—20 & 21 Vict. c. 85, s. 31.*] The wilful neglect or misconduct which deprives a petitioner of his right to a decree under 20 & 21 Vict. c. 85, s. 31, is wilful neglect or misconduct which has conduced to the respondent's first fall from virtue. Conduct which would have amounted to wilful neglect and misconduct within the meaning of the section, if committed prior to the respondent's first act of adultery, but not amounting to connivance, will not deprive the petitioner of his right to a decree when not committed until after an adulterous intercourse has been established

CONDUCT CONDUCING TO ADULTERY—*contd.*
between the respondent and the co-respondent, St. Paul *v.* St. Paul. [739

2. —— 20 & 21 *Vict. c.* 85, *s.* 43—*Examination of Petitioner by the Court—Opposed Suit.*] In answer to a husband's petition for dissolution of marriage, the wife pleaded that the petitioner had separated from her without reasonable cause, and thereby conduced to her adultery. The Court refused to examine the petitioner under the 43rd section of the 20 & 21 Vict. c. 85, as to the circumstances leading to the separation, having no power to examine the respondent as to these circumstances.—A husband having married a woman of loose character, with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in a place where she would be accessible to temptation, and where she was guilty of adultery. There was no evidence that there was any reasonable cause for the separation.—The Court was of opinion that this was conduct conducing to her adultery, and dismissed the petition. Baylis *v.* Baylis - - - - - - 395

CONFESSION—Adultery—Evidence - 29, 330
See Evidence of Adultery. 1.
Leave to Proceed without Co-respondent.

CONFIRMATION—Will—Execution - 673
See Will not duly Executed.

CONFRONTATION — *Identity of Wife — Divorce Act* (20 & 21 *Vict. c.* 85), *s.* 43.] Where it was necessary for the witnesses of a husband to be confronted with the wife (the petitioner) to enable him to establish his defence, and the husband was unable to ascertain her address, the Court ordered the wife to supply to him her address within three days, or to attend at the hearing. Lloyd *v.* Lloyd - - - - 222

2. —— *Practice—Leave to appear and answer.*] A respondent was allowed to appear and answer, after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the witnesses for the petitioner, for the purpose of being identified. Hindmarsh *v.* Hindmarsh - - - - 24

CONJUGAL RIGHTS—Restitution 176, 563, 568
See Restitution of Conjugal Rights. 1, 2, 3.

CONNIVANCE—*Agreement to Separate.*] A deed of separation securing an allowance to a wife, held not to prove the wife's connivance at the husband's adultery, in the absence of evidence that at the time when it was entered into the wife was aware of the adulterous intercourse which the husband had then established with another woman, and that she consented to its being continued.—If a wife, although unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him she is guilty of connivance. Ross *v.* Ross 734

—— Petition—Dismissal - - - 333
See Dismissal of Petition.

CONSENT OF HUSBAND—Renunciation by married woman - - - - 595
See Renunciation by Married Woman.

CONSTRUCTION—Will—Words carrying residue
See Words Carrying Residue. [543

CONTINGENCY—Will - - 88, 380
See Will on Contingency. 1, 2.

CO-RESPONDENT—Costs - - 25, 333, 510
See Costs of Co-respondent. 1, 2.
Dismissal of Petition.

—— Evidence—Confession of wife - - 330
See Leave to Proceed without Co-respondent.

CO-RESPONDENT WHO HAS NOT ANSWERED—*Practice—Claim for Damages—Appearance, but no Answer by Co-Respondent—Right of Co-Respondent's Counsel to cross-examine Witnesses, and address the Court.*] A co-respondent from whom damages are claimed, and who has appeared, but has not answered, is not entitled to cross-examine the petitioner's witnesses, or to address the jury on the question of damages. But after the damages have been assessed by the jury, and a decree nisi has been pronounced, he may recall and cross-examine the witnesses, and address the Court on the question of costs. Lyne *v.* Lyne - - - 508

COSTS—Access to children—Judicial separation
See Access to Children. [167

—— Administration pendente lite - - 730
See Administration pendente Lite. 1.

—— Alimony—Intervention of Queen's Proctor 96
See Intervention of Queen's Proctor. 1.

—— Alteration of pleading - - - 558
See Alteration of Pleading.

—— Collusion - - - - - 505
See Collusion. 2.

—— Co-respondent - - - 25, 333, 510
See Costs of Co-respondent. 1, 2.
Dismissal of Petition.

—— Co-respondent who has not answered 508
See Co-respondent who has not Answered.

—— Countercharge of adultery—Practice 163
See Countercharge of Adultery.

—— County court jurisdiction - - 604
See County Court Jurisdiction. 1.

—— Custody of children - - - 437
See Custody of Children. 1.

—— Decree of House of Lords—Practice - 293
See Decree of House of Lords.

—— Examination of wife — Dissolution of marriage - - - - - - 125
See Examination of Wife.

—— Improperly propounding will - - 118
See Improperly Propounding Will.

—— Interest suit—Unsuccessful party - 351
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—— Intervention—Practice - 437, 456, 531
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—— Jury discharged without verdict - 467
See Order to Pay Damages and Costs.

—— Lien—Alimony - - - - 254
See Lien on Alimony.

—— New Trial—Executor - - - 456
See Opposition to Will Abandoned.

COSTS—*continued.*
—— Non-appearance of defendant—Practice 539
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—— Notice under Rule 41 - - - 542
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—— Order to pay—Bankruptcy—Discharge 467
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—— Real estate - - - - 344
See Costs out of Real Estate.
—— Second trial—Dissolution of marriage 368
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—— Sequestration - - - - 622
See Sequestration. 1.
—— Wife—Dismissal of petition—Collusion 121
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—— Wife—Practice - - - 300, 729
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Costs of Wife.
—— Will — Loss — Proof of contents — Negligence - - - - 472
See Lost Will. 3.
—— Will—Unsuccessful opposition 54, 239, 249, [359
See Unsuccessful Opposition to Will. 1, 2, 3, 5.

COSTS OF CO-RESPONDENT—*Dissolution of Marriage—Petition Dismissed—Co-Respondent's Costs.*] In a suit by a husband for dissolution, the jury were discharged without giving a verdict; the petitioner did not go to a second trial, and the petition was dismissed. There was no evidence connecting the co-respondent with the respondent, except that of two witnesses, who swore to acts of adultery, but whose evidence did not satisfy the jury that adultery had been committed. — The Court condemned the petitioner in the co-respondent's costs. Whitmore *v.* Whitmore - 25

2. —— *Separation—Subsequent Abandoned Life of Respondent prior to her adultery with Co-Respondent.*] Where the petitioner had lived separate from the respondent for several years in consequence of her intemperance, and during the separation and prior to the adultery proved, she had been leading an abandoned life, the Court, notwithstanding that the co-respondent must have known that the respondent when he committed the adultery was a married woman, refused to condemn him in costs. Nelson *v.* Nelson - 510
—— Connivance of petitioner—Dismissal of petition - - - - - 333
See Dismissal of Petition.

COSTS OF FORMER TRIAL—*Husband's Petition for Dissolution—Second Trial.*] On the trial of the issues in a husband's suit for dissolution of marriage, no witnesses were called by the respondent or the co-respondent; and the jury, being unable to agree, were discharged without giving a verdict. The issues came on for trial a second time, when witnesses were called by the co-respondent, and the jury found a verdict of not guilty.—The Court refused to condemn the petitioner in the co-respondent's costs of the first trial. Wight *v.* Wight - - - - - - 368

COSTS OF WIFE—*Two Suits by Wife—Practice.*] —A wife instituted a suit for nullity of marriage on the ground of the husband's impotence. She failed to establish the charge and the suit was dismissed, but the husband was ordered to pay and paid a certain sum towards her costs. She afterwards instituted a suit for dissolution on the ground of his adultery coupled with cruelty, and she established those charges and obtained a decree. The husband was condemned in the wife's costs of the suit for dissolution, but he was allowed to deduct therefrom the amount which he had paid on account of her costs in the suit for nullity. Ditchfield *v.* Ditchfield - - - - 729
—— Charge of cruelty not proved—Judicial separation - - - - 300
See Charge of Cruelty not proved.

COSTS OUT OF REAL ESTATE—*Will—Real Estate—Jurisdiction of Court—Legatee—Leave to appear to apply to vary order for Costs—Insane Delusions—Question as to Time of their Appearance not satisfactorily shewn at Trial—Discovery of Further Evidence—New Trial.*] The Court has not jurisdiction to order costs to be paid out of real estate. When the Court made an order for the payment of the costs of a defendant who was interested in the residue, and had unsuccessfully contested the validity of a will, out of the estate, and it afterwards appeared that the residue was insufficient to meet the defendant's costs, and that unless the order was varied, a specific legatee who had not appeared at the trial would have to contribute towards those costs, the Court allowed the legatee to enter an appearance in the cause to enable him to move the Court to vary the order. When the only material question at issue was whether the deceased, who was proved to have been subject to insane delusions, was subject to them at the date of the will, and the evidence of the plaintiff's principal witnesses negatived the existence of delusions at any time, and the defendant's witnesses were unable to fix the date of their first appearance, and the defendant after the trial (which terminated in a verdict in favour of the will) discovered evidence tending to throw further light on the question, the Court, being of opinion that the matter had not received that full investigation and final solution on which it was proper to found a decree, granted to the defendant a new trial upon payment by him of the plaintiff's costs of the former trial. Young *v.* Dendy - - 344

COUNTERCHARGE OF ADULTERY—*Costs—Rule 159—Practice.*] Where the petitioner established adultery against the co-respondent, but the co-respondent established a countercharge of adultery against the petitioner, and the petition was dismissed; the Court held that the co-respondent was liable for the costs of proving the wife's adultery, and that the petitioner was liable for costs incurred by the co-respondent in establishing the countercharge of adultery.—The 159th Rule, directing that the wife's costs of the hearing, when the decision of the Court or jury is against her, shall not be allowed against the husband unless applied for and ordered to be allowed at the time of hearing, is not imperative on the Court, but the Court may dispense with it, and entertain an application for the wife's costs subsequently to the hearing in a meritorious case. Conradi *v.* Conradi - 163

COUNTY COURT JURISDICTION—*Costs*—20 & 21 *Vict. c.* 77, *s.* 59.] After a testamentary cause has

COUNTY COURT JURISDICTION—*continued.*
been transferred from the Probate Court to a county court, the Probate Court has no power to make an order as to the costs incurred before the transfer. The judge of the county court has power to make an order as to such costs. MACLEUR *v.* MACLEUR - - - - - - 604

2. —— *Jurisdiction of the Probate Court—County Court Causes—New Trials*—20 & 21 *Vict. c.* 77, *ss.* 54 *to* 59—21 & 22 *Vict. c.* 95, *s.* 10.] When a testamentary cause, in which a county court has jurisdiction, has been commenced in, or has been transferred to, a county court, the Court of Probate has no power to grant a new trial, or to make any order in the cause, unless it is brought before it by way of appeal from the determination of the judge of the county court in point of law, or upon the admission or rejection of evidence, under the 58th section of the 20 & 21 Vict. c 77. ZEALLEY *v.* VERYARD [195

CREDITOR—Administration 193, 288, 314, 327, [594, 637
See ADMINISTRATION TO CREDITOR. 1, 2, 3, 4.
See ADMINISTRATION TO FEMALE CREDITOR.
CITATION TO TAKE ADMINISTRATION.
—— Administration ad colligenda bona - 727
See ADMINISTRATION AD COLLIGENDA BONA.
—— Administration bond—Guardian of infant
See GUARDIAN OF INFANT. 1. [245
—— Administration pendente lite - - 730
See ADMINISTRATION PENDENTE LITE. 1.

CROSS-EXAMINATION OF PARTIES AS TO ADULTERY—*Evidence—Suit founded on Adultery—Right of Queen's Proctor to cross-examine*—14 & 15 *Vict. c.* 99, *s.* 4—16 & 17 *Vict. c.* 83, *s.* 5—22 & 23 *Vict. c.* 61, *s.* 6—*Reckless communication of Disease.*] A petitioner and a respondent in a suit for dissolution of marriage, who are examined under the 6th section of the 22 & 23 Vict. c. 61, upon an issue of cruelty or desertion, may be cross-examined upon issues of their own adultery, and of each other's adultery. The Queen's Proctor intervening, and alleging collusion and the adultery of the petitioner, is entitled to cross-examine all the witnesses called by the petitioner and the respondent. When the respondent has been examined under the 6th section of the 22 & 23 Vict. c. 61, the Queen's Proctor may, therefore, cross-examine him for the purpose of proving the petitioner's adultery.—If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty. BOARDMAN *v.* BOARDMAN - - 233
—— Judicial separation - - - 93
See DESERTION BY HUSBAND. 8.

CROSS-SUITS—Prayer for relief in answer - 365
See PRAYER FOR RELIEF IN ANSWER.

CRUELTY OF HUSBAND—*Adultery of Wife.*] In a suit by a husband for dissolution of marriage, it was established that the wife was guilty of adultery, and the husband of cruelty and misconduct, conducing to her adultery. The Court refused to amend the husband's petition by allowing a prayer for judicial separation to be substituted for the prayer for dissolution, and the petition was dismissed.—It is doubtful whether, since the passing of the Divorce Act, a husband who has been guilty of cruelty and desertion can obtain a judicial separation on the ground of his wife's adultery. LEMPRIERE *v.* LEMPRIERE - 569

2. —— *Communication of Disease—Evidence—New Trial.*] In support of a charge of cruelty, evidence was given that the wife was infected with disease, and that she had not been unchaste before marriage or unfaithful after it; but there was no evidence, beyond the presumption arising from the state of the wife, that the husband had ever suffered from the disease. The husband positively denied that he ever was diseased. The jury found that the husband was guilty of cruelty: —*Held* (by the full Court, Willes, J., dissenting), that there was not sufficient evidence to support the verdict; and a rule was made absolute for a new trial on payment of costs. MORPHETT *v.* MORPHETT - - - - - - 702

3. —— *Dissolution of Marriage.*] In order to establish the charge of cruelty, it is necessary to prove actual violence of such a character as to endanger personal health or safety, or the reasonable apprehension of such violence. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread. MILFORD *v.* MILFORD - - - - - - 295

4. —— *Drunkenness—Venereal Disease—Wilful communication — Evidence — Presumption.*] Habitual drunkenness, and a series of annoyances, and extraordinary conduct on the part of the husband, do not constitute legal cruelty. The communication of a venereal disorder to the wife must have been wilful on the part of the husband to establish it as cruelty. But that wilfulness may be presumed from the surrounding circumstances, by the condition of the husband, and by the probabilities of the case, after such explanations as he may offer. Primâ facie, the husband's state of health is to be presumed to be within his own knowledge; but he may rebut this by his own oath, when admissible as a witness, or by other proof. BROWN *v.* BROWN - - 46

5. —— *Judicial Separation—Answer—Deed of Separation—Sincerity of Suit.*] In answer to a petition for judicial separation on the ground of cruelty, the respondent pleaded a traverse and condonation, and further alleged that the petitioner had consented to a deed of separation, and that the suit was not instituted bonâ fide, but for the purpose of obtaining an increased allowance. —The Court refused to order these allegations to be struck out.—An allegation that by reason of the deed of separation the petitioner was not entitled to institute the suit, was ordered to be struck out. WILLIAMS *v.* WILLIAMS - 178

6. —— *Previous decree of Judicial Separation on ground of Husband's cruelty—Husband's subsequent Adultery.*] Where a wife had obtained a

CRUELTY OF HUSBAND—*continued.*
decree of judicial separation on the ground of the husband's cruelty, and continued to live separate from him, and the husband subsequently committed adultery, upon proof of such adultery, and of the decree for judicial separation, the Court made a decree nisi for the dissolution of the marriage. Bland *v.* Bland - - 237
—— Charge not proved—Costs of wife - 300
See Charge of Cruelty not Proved.
—— Communication of disease - - 233
See Cross-examination of Parties as to Adultery.
—— Estoppel - - - - - 483
See Judgment in Previous Suit. 2.
—— Evidence of parties - - - 513
See Evidence of Parties.

CUSTODY OF CHILDREN—*Father—Charge of Dissoluteness — Detectives — Interveners — Costs.*] The Court views with disfavour an attempt to get up a charge of adultery against a husband, who has obtained a decree dissolving his marriage, by tracking him from place to place, with a view to obtain an order depriving him of the custody of his children.—Where relations intervene in an application for the custody of a child, they do so at the peril of being condemned in costs, if their intervention is unsuccessful.—*Semble*, where a petitioner (the father), after a decree dissolving his marriage, is shewn to be leading a notoriously dissolute life, the Court will hold him disqualified to have the custody of his child.—An application for the dismissal of an appeal by the appellant should be made to the full Court, and not to the Judge Ordinary. March *v.* March [437

2. —— *Jurisdiction of Court.*] The Court has jurisdiction by its order to regulate the custody of children, until they attain the age of 16 years. Mallinson *v.* Mallinson - - - 221

3. —— *Maintenance—Dissolution of Marriage—Interveners—Settlements*—22 & 23 *Vict. c.* 61, *s.* 5.] After a decree absolute had been pronounced for the dissolution of a marriage on the ground of the husband's adultery and cruelty, applications were made for the custody of the infant children of the marriage by their father and mother, and by third persons, who had been allowed to intervene for the benefit of the children.—The Court being of opinion that neither the father nor the mother were, according to the evidence given at the hearing of the cause, fit to be entrusted with the care and custody of the children, gave the custody of them to the interveners, relatives of the husband, but directed that the parents should be allowed reasonable access. In making an order as to settled property under the 22 & 23 Vict. c. 61, s. 5, the Court will take into consideration the conduct of the parties, as well as their pecuniary position. A marriage having been dissolved by reason of the husband's adultery and cruelty, an application was made for an order as to the settled property, under the 22 & 23 Vict. c. 61, s. 5.—The Court estimated the total income of the husband at 1159*l.*, part of it being derived from settled property, to which the wife had contributed 3000*l.* It ordered that 200*l.* a year should be paid out of

CUSTODY OF CHILDREN—*continued.*
the settled property to the persons who were entrusted with the custody of the children of the marriage, for their maintenance and education; and taking into consideration that the wife was not free from blame, and that she had contracted debts to the amount of about 3000*l.* previous to the separation, for which the husband was liable, and also the expense he had incurred by reason of the suit for dissolution, it ordered that 250*l.* a year out of the settled property should be paid, during the respondent's life, to the petitioner, dum casta et sola vixerit. Chetwynd *v.* Chetwynd - - - - - - 39

4. —— *Maintenance—Judicial Separation*—22 & 23 *Vict. c.* 61, *s.* 4.] The petitioner having obtained a judicial separation from her husband by reason of his adultery, and also the custody of their two children until the Court should otherwise direct, presented a further petition praying the Court to order the respondent to pay to her a sum or sums of money for the past and future maintenance of the children. The respondent, in answer, asked the Court to order the children to be delivered up to his father and sister, who were quite prepared at their own costs to provide for the maintenance and education of them.—The Court refused to take the children out of the custody of their mother, and made an order upon the respondent to contribute in a moderate extent to their maintenance. Milford *v.* Milford 715

CUSTODY OF CHILDREN PENDING SUIT—*Mother Respondent.*] The Court made an order, giving the custody of two infant children—the one being of the age of between three and four years, the other of eighteen months—to the mother, the respondent in a suit for dissolution of marriage, on the ground that the mother's health was suffering from being deprived of their society, and that they were living with a stranger, and not with the father.—*Cartlidge* v. *Cartlidge* (2 Sw. & Tr. 567; 31 L. J. (P. M. & D.) 85), distinguished. Barnes *v.* Barnes - - 463

DAMAGES—Dismissal of petition - - 333
See Dismissal of Petition.
—— Order as to application—Practice - 36
See Order as to Application of Damages.
—— Order to pay—Bankruptcy—Discharge 467
See Order to Pay Damages and Costs.
—— Settlement—Decree absolute - - 168
See Decree Absolute. 2.
DATE—Will—Mistake—Probate - - 664
See Wrong Date.
—— Will—Mistake—Evidence - - 139
See Mistake in Will. 2.
DEATH—Decree—Practice - - - 531
See Intervention.
—— Suit commenced after death of one of the parties to a marriage—Nullity - 559
See Nullity of Marriage. 2.
DECLARATION—Destroyed will—Evidence 633
See Will Destroyed. 2.
DECLARATION OF DECEASED PERSON—*Testamentary Suit — Interest — Evidence.*] When a

DECLARATION OF DECEASED PERSON—*contd.*
deceased person is proved to have made a statement that another person was related to her—e.g. was her sister—she is to be presumed to have meant that she was related to her legitimately—e.g. was her legitimate sister—unless something appears to the contrary.—A recital in a deed executed by the deceased, making a provision for the defendant, in which the defendant was described as her sister, was held sufficient evidence to entitle the Court to find that the deceased and the defendant were natural and lawful sisters. Smith *v.* Tebbitt - - - - - 354

DECLARATION OF TESTATOR—*Evidence—Lost Will—Proof of Contents.*] The verbal and written declarations or statements made by a testator in and about the making of his will when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will. A testator wrote out a will in the presence of M., and read it aloud to him, and gave him a paper enclosed in an envelope, which he stated was a copy of the will. On the same evening he wrote a letter to M. stating that he had executed the will and had appointed him executor. It was proved that the will was executed by the testator about that time. The will could not be found at his death, and it was held that the declarations of the testator at the time when he made the will and the letter written by him, were admissible as evidence of its contents. Johnson *v.* Lyford - - - - - 546

DECLARATION ON OATH—*Affidavit—Administratrix resident abroad—Practice.*] A declaration on oath received instead of an affidavit, the person making it being resident abroad, where an affidavit could not be made. In the Goods of Lambert - - - - - - 138

DECREE—Absence of respondent—Practice 169
See Petition for Reversal of Decree.

—— Restitution of conjugal rights - - 563
See Restitution of Conjugal Rights. 2.

DECREE ABSOLUTE—*Dissolution of Marriage and Decrees Nisi and Decrees Absolute—23 & 24 Vict. c. 144, s. 7—29 Vict. c. 32, s. 3.*] The 3rd section of the 29 Vict. c. 32, which extends the time for making decrees nisi absolute from three to six months, applies to suits pending at the time when the Act came into operation. But where decrees nisi had been pronounced before the Act came into operation, whereby three months had been fixed as the time at the expiration of which they were to be made absolute, the Court held that it was at liberty under the proviso to the section, "unless the Court shall, under the power now vested in it, fix a shorter time," to make them absolute at the end of the three months. Watton *v.* Watton. Dow *v.* Dow. Davies *v.* Davies - - - - - 227

2. —— *Settlement of Damages—Time for Application.*] It is competent to the Court to make an order for the settlement of damages, after the decree nisi has been made absolute. Bellingay *v.* Bellingay - - - - - - 168

—— Marriage - - - - - - 691
See Marriage before Decree Absolute.

—— Verdict—Death - - - - - 531
See Intervention.

DECREE OF HOUSE OF LORDS—*Appeal—Record Practice—Costs.*] A decree made by the House of Lords, on appeal, will be recorded on the files of the Court upon a copy of such decree, verified by affidavit, being deposited in the registry.—A wife's petition for nullity was dismissed by the Court, and no order was made as to costs.—On appeal, the House of Lords pronounced a decree of nullity, but made no order as to costs:—*Held*, that the Court had no power to make an order as to costs. L. (falsely called H.) *v.* H. - 293

DEED OF GIFT — Administration — Foreign grant - - - - - 183
See Administration with Will Annexed. 1.

—— Testamentary - - - - - 214
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DEED OF SEPARATION—Connivance—Adultery
See Connivance. [734

—— Desertion by husband - - 251, 601
See Desertion by Husband. 5, 6.

—— Judicial separation—Answer - - 178
See Cruelty of Husband. 5.

—— Post-nuptial settlement - - 648
See Post-nuptial Settlement.

—— Restitution of conjugal rights - 176
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DELAY—Alimony pendente lite - - 651
See Alimony pendente Lite. 4.

—— Nullity of marriage—Impotence - 127
See Nullity of Marriage. 3.

DELAY IN PROSECUTING SUIT — *Practice — Rule to dismiss Petition.*] The Court refused to grant a rule calling on a petitioner to shew cause why a co-respondent should not be dismissed from a suit for dissolution of marriage, on the ground that it had not been prosecuted with due diligence, but granted a rule nisi for the dismissal of the petition on that ground. Hancock *v.* Hancock [334

DELUSIONS—Testamentary capacity—Evidence
See Costs out of Real Estate. [344

DEPOSITION OF FOREIGN WITNESS—*Evidence—Requisition to Foreign Court—Mode of Examination.*] A requisition with interrogatories and cross-interrogatories annexed to it, issued to a French Court to examine a witness resident in France. The judge of the French Court having the interrogatories and cross-interrogatories before him, examined the witness by putting to him such questions as he deemed convenient, and no questions were put or suggested by the counsel and agent of the parties who were present at the examination.—The Court doubted whether the deposition so taken and returned under the requisition by the French Court was admissible in evidence, but declined to reject it. Hitchins *v.* Hitchins - - - - - - 153

DESERTION BY HUSBAND.] Held to commence, not at the time when the husband and wife ceased to cohabit, but at the time when the husband made up his mind to abandon the wife and live with another woman. Gatehouse *v.* Gatehouse - - - - - - 331

2. —— A husband and wife were cohabiting in Jamaica, where the husband held an appoint-

DESERTION BY HUSBAND—*continued.*

ment, when the wife was obliged to come to England in consequence of ill health. The husband afterwards, in 1851, asked her to return, and provided funds for her passage, but her health was not sufficiently re-established to enable her to accept his offer. She had no further communication with him, but in 1856 he made her an allowance, which he continued to pay until 1860:—*Held*, that as she had never made any offer to return to him after refusing his offer in 1851, he had not deserted her. KEECH *v.* KEECH [641

3. —— No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has ceased to exist, whether by the adverse act of husband and wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed. The refusal by either, of the request of the other, to resume conjugal relations, does not constitute the offence of desertion.—A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. They never afterwards resumed cohabitation, and neither of them took any step for the purpose of bringing about a reconciliation. The conduct of the husband in holding aloof from the wife, and making no demand of cohabitation, was held not to constitute desertion. FITZGERALD *v.* FITZGERALD - - - - - 694

4. —— A husband, having refused to cohabit with his wife, or to provide a home for her, offered her 100*l.* on condition that she would not molest him in future by insisting on her conjugal rights. She agreed to the condition, and received the money, and they never afterwards cohabited.—The Court held that these facts did not constitute desertion on the part of the husband. BUCKMASTER *v.* BUCKMASTER - - - 713

5. —— *Deed of Separation.*] A husband and wife separated, and immediately afterwards executed a deed of separation, containing covenants on the part of the husband (the respondent) to allow the petitioner (the wife) 100*l.* per annum for the maintenance of herself and their infant son until he attained the age of fifteen, and also giving the petitioner the sole custody of their son up to that age. The respondent paid the allowance only for the first two quarters, and then went to India, and afterwards declined to pay it. The wife petitioned for a dissolution of her marriage on the ground of desertion and adultery:—*Held*, that the execution of the deed by the wife was inconsistent with the charge of desertion; for even assuming that the covenant giving the wife the sole custody of the child would make the deed void in equity, and notwithstanding the failure on the part of the husband to perform his part of the contract, the separation was in the first instance voluntary, and being an act done under the deed, it could not be treated as if the deed had never existed.—*Semble*, that if a husband, determining to abandon his wife, were fraudulently, by a show of an agreement which he never intended to fulfil, to induce her to consent to a separation, such consent would be no answer to the charge of desertion. CRABB *v.* CRABB - - - - - - 601

6. —— *Deed of Separation—Allowance by Wife to Husband after Desertion.*] After a husband had deserted his wife, he wrote to her asking for assistance to save him from starving, but he refused to return to her or to allow her to come to him. She consented to make him an allowance, and a few months after the desertion they both signed a deed of separation, whereby the payment of the allowance was secured to him. The deed was not carried into effect, but she paid the allowance to him for three months, and then stopped it, because she thought that by continuing the payment she was encouraging him to keep apart from her. She afterwards wrote and asked him to resume cohabitation, which he refused to do. More than two years having elapsed since the commencement of the desertion, she filed a petition:—*Held*, that, as she never consented to his remaining apart from her, the desertion for two years and upwards was established. NOTT *v.* NOTT - - - - - 251

7. —— *Maintenance of Wife during Separation—Reasonable Cause of Desertion.*] A husband who withdraws from cohabitation with his wife may be guilty of the offence of "desertion" within the meaning of s. 16 of the Divorce Act (20 & 21 Vict. c. 85), although he continues to support her. Desertion "without cause" means "without reasonable cause." Such reasonable cause is not necessarily a distinct matrimonial offence on which a decree of judicial separation or dissolution could be founded; but it must be grave and weighty. Mere frailty of temper and habits which are distasteful to a husband, are not reasonable ground for depriving a wife of the protection of his home and society. YEATMAN *v.* YEATMAN [489

8. —— *Offer to return—Adultery of Respondent—Cross-examination of Respondent as to Adultery.*] Where the answer to a petition alleging desertion merely traverses the charge, evidence is not, in strictness, admissible of an offer to return subsequent to the alleged desertion; nor is evidence admissible of facts shewing the insincerity of such offer to return. The offer to return should be pleaded in the answer, and the facts relied upon to shew its insincerity should be pleaded in the replication.—Where the respondent, in a suit by a wife for judicial separation on the ground of desertion, was called to prove that he had made the petitioner an offer to return to cohabitation before her right to a judicial separation had accrued, the Court allowed questions to be put to him in cross-examination, tending to shew that at the time when the alleged offer was made, he was adulterously cohabiting with another woman. MALLINSON *v.* MALLINSON - - - 93

—— Answer—Withdrawal of petition - 466
See WITHDRAWAL OF PETITION.

DESTRUCTION OF WILL—Evidence—Lost will
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—— Revocation - - - - 209
See REVOCATION OF WILL. 2.

DISCHARGE—Bankruptcy—Order to pay damages and costs - - - 467
See Order to Pay Damages and Costs.

DISCONTINUANCE OF PROCEEDINGS—Costs
See Alteration of Pleading. [558

DISCOVERY OF DOCUMENTS—*Practice*—20 & 21 *Vict. c.* 77, *s.* 36.] The Court of Probate possesses powers as extensive as the Court of Chancery and the superior courts of common law to compel a discovery, by virtue of the 36th section of the 20 & 21 Vict. c. 77, such powers being "auxiliary to the trial of questions of fact by a jury before the Court itself." The Court of Probate will exercise its power of compelling a discovery in cases where a discovery would be granted by the Court of Chancery, in order that parties may not be compelled to resort to the Court of Chancery for assistance in the prosecution of a suit in the Court of Probate. Hunt *v.* Anderson - 476

DISCREDITING WITNESS—Evidence - 70
See Attesting Witness.

DISCRETION OF COURT—*Dissolution of marriage—Adultery of the Respondent and Petitioner proved*—20 & 21 *Vict. c.* 85, *s.* 31.] The discretion to be exercised under the 31st section of 20 & 21 Vict. c. 85, must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable or capable of excuse. There must be some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. Morgan *v.* Morgan - - 644

—— Dissolution of marriage - - 572
See Verdict of Jury.

DISEASE—Cruelty—Evidence 46, 233, 702
See Cross-examination of Parties as to Adultery.
Cruelty of Husband. 2, 4.

DISMISSAL OF PETITION—*Connivance of Petitioner—Claim for Damages—Costs of Co-respondent.*] A petition by a husband, and claiming damages from the co-respondent, was dismissed on the grounds of the connivance of the petitioner and condonation, and the petitioner was ordered to pay the co-respondent his costs, although the adultery of the respondent and the co-respondent was proved. Adams *v.* Adams - - 333

—— Delay—Practice - - - 334
See Delay in Prosecuting Suit.

—— Dissolution of marriage — Misconduct of wife - - - - - 77
See Misconduct of Wife. 1.

DISSOLUTION OF MARRIAGE — Adultery of husband—Cruelty - - - 569
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—— Cruelty of husband - - - 295
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—— Desertion: *See* Cases collected under Desertion by Husband.

—— Discretion of court—Adultery of respondent and petitioner - - - 644
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—— Dismissal of petition—Costs of co-respondent - - - - - 25
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—— Evidence of adultery - - - 29
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—— Evidence of parties—Charge of cruelty 513
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—— Examination of wife—Decree - - 125
See Examination of Wife.

—— Hearing in camerâ—Practice - - 640
See Hearing in Camerâ.

—— Judgment in previous suit—Adultery of petitioner - - - - 514
See Judgment in previous Suit. 1.

—— Leave to proceed without co-respondent
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—— Settlements—Guardian of minor children
See Guardian of Infant. 2. [587

—— Two trials—Costs of former trial - 363
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—— Will — Loss — Revocation — Presumption
See Lost Will. 1. [608

—— Will—Mistake - - - 8, 139
See Mistake in Will. 1, 2.

EVIDENCE OF ADULTERY—*Confessions of Respondent and Co-respondent uncorroborated by other evidence of Adultery.*] In a suit for dissolution of marriage, the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent.—The Court being satisfied, from the circumstances under which these admissions were made, and the conduct of the respondent at the time when they were made and subsequently, that they were genuine, and that there was no reasonable ground to suspect collusion, pronounced a decree nisi, with costs against the co-respondent. Williams *v.* Williams - - - - - 29

2. —— *Judicial Separation — Adultery — Evidence.*] A charge of adultery in a suit by a wife for judicial separation rested upon the evidence of one witness, who was a woman of loose character. — The Court, without deciding affirmatively whether or not the adultery charged had been committed, declined to pronounce a decree upon her uncorroborated testimony, and dismissed the petition. Ginger *v.* Ginger - - 37

EVIDENCE OF MARRIAGE—*Dissolution of marriage—Evidence.*] In a suit for dissolution, formal proof of the marriage is not indispensably necessary, but sufficient evidence must be produced to satisfy the Court of the fact of the marriage. Evidence that a man and woman residing at S. had left S. together, stating that they intended to get married at G.; that they had returned to S. and stated that they had been married at G.; and that they afterwards cohabited for many years at S. as husband and wife:—*Held*, no better evidence being procurable, to be sufficient proof of the marriage. PATRICKSON *v.* PATRICKSON 86

EVIDENCE OF PARTIES—*Suit for Dissolution—Charge of Cruelty and Prayer for Judicial Separation in Answer*—22 & 23 *Vict. c.* 61—29 *Vict. c.* 32, *s.* 2.] An answer to a petition for dissolution of marriage on the ground of adultery contained a charge of cruelty and a prayer for a judicial separation. The evidence of the respondent was held to be admissible to prove the cruelty. The 2nd section of the 29th Vict. c. 32, empowering the Court to grant relief upon a prayer contained in an answer, does not make any alteration in the law of evidence. BLAND *v.* BLAND - - 513

—— Restitution of conjugal rights - - 563
See RESTITUTION OF CONJUGAL RIGHTS. 2.

EXAMINATION OF HUSBAND—*Alimony—Practice—Rule* 86.] A wife who has presented a petition for alimony has a right to subpœna her husband for the purpose of examining him as a witness in support of her petition. ANDERSON *v.* ANDERSON - - - - - 512

EXAMINATION OF PETITIONER — Practice—Dissolution of marriage—Conduct conducing to adultery - - - - - 395
See CONDUCT CONDUCING TO ADULTERY. 2.

—— Practice—Judge's notes—Evidence of deceased witness - - - 514
See JUDGMENT IN PREVIOUS SUIT. 1.

EXAMINATION OF WIFE—*Decree of Dissolution of Marriage—Judicial Separation—Costs.*] A wife who petitioned for a dissolution of marriage on the ground of adultery coupled with cruelty, prayed at the hearing for a decree of judicial separation instead of dissolution, and that decree was pronounced on the grounds of adultery and cruelty. As she was not a competent witness in a suit for judicial separation founded on adultery, the Court ordered her costs of attending personally to give evidence to be disallowed. DENT *v.* DENT - 125

EXAMINATION OF WITNESS — Deposition of foreign witness—Practice - - 153
See DEPOSITION OF FOREIGN WITNESS.

EXECUTION OF WILL—*Acknowledgment—Ignorance of Attesting Witnesses—Presumption of Due Execution.*] A testatrix left a holograph will with a full attestation clause, also holograph, but the only signature was that embodied in the attestation clause, and it had apparently been inserted at some time subsequent to the writing of the attestation clause. The two attesting witnesses did not know whether or not the signature was on the paper when they subscribed their names.—The Court held that it was at liberty to judge, from the circumstances of the case, whether it was probable that the signature was in the attestation

EXECUTION OF WILL—*continued.*
clause at the time of the attestation, and, being of opinion that it was, granted probate of the will. IN THE GOODS OF HUCKVALE - - - 375

2. —— *Attestation—Wills Act* (1 *Vict. c.* 26), *s.* 9—*Signature not seen by Attesting Witnesses.*] If a testator signs his will in the presence of the attesting witnesses who see him in the act of writing, and they then attest, the attestation is good, although they do not see the signature, and he does not acknowledge it. The attesting witnesses to a will saw the testatrix writing something on the will before they signed, but they did not see what she wrote, and they did not know that it was a will. When they subscribed their names they did not see the attestation clause, which contained the testatrix's signature, or any of the writing on the will, as the testatrix concealed it from them by holding a piece of blotting paper over it. There was a full attestation clause in the testatrix's handwriting:—*Held*, that as the witnesses had seen testatrix write what the Court presumed to be her signature, although they did not see the signature, and she did not acknowledge it to them, the attestation was sufficient. SMITH *v.* SMITH - - - - 143

3. —— *Blank space preceding Signature—"Foot or end"—Lord St. Leonards' Act*, 15 & 16 *Vict. c.* 24, *s.* 1.] A will ended in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation clause and the signatures being written on the top of the fourth page:—*Held*, that it was duly executed. HUNT *v.* HUNT - - - 209

4. —— *Evidence of Attesting Witness.*] The party propounding a will is bound to call one of the attesting witnesses to prove its due execution. BOWMAN *v.* HODGSON - - - - 362

5. —— *Execution in blank—Doubtful disposition of Residue—Administration with Will annexed to Widow.*] Although it is the practice to grant administration with the will annexed to a residuary legatee in preference to the widow, the Court will not pass by the widow unless it is clear that the residue is left to some other person. A testator duly executed a will whereby he gave all his property to trustees upon trust, to invest part of it in an annuity for his widow, and to divide the residue amongst his children, but the amount of the annuity and the names of the trustees and executors were left in blank.—The Court granted administration with the will annexed to the widow. IN THE GOODS OF POOL - - - - 206

6. —— *Place of Testator's Signature*—15 *Vict. c.* 24.] A will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and of the attesting witnesses, which were written crossways on the second page:—*Held*, that the will was duly executed. IN THE GOODS OF COOMBS - - - - 302

7. —— *Position of Names of Witnesses—Attestation.*] A testamentary paper is not entitled to probate, unless the Court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature. Where, therefore, a will was written on one page of a foolscap sheet of paper, and the

EXECUTION OF WILL—*continued.*
testator's signature appeared at the end of that page, with the words—Witness, William Hatton, and the names of three persons were subscribed, under a memorandum not testamentary, at the top of the second page of the same sheet, the Court came to the conclusion that, from the position of the three names and the circumstances of the case, they were not placed there for the purpose of attesting the will, and therefore pronounced the execution to be invalid. In the Goods of Wilson - - - - - - 269

8. —— *Position of Testator's Signature beside or opposite to the end of Will—15 Vict. c. 24, s. 1.*] A will ended on the middle of the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and the signatures of the testator and the attesting witnesses were written on the third page, the signature of the testator being opposite to the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the will, and the signatures of the attesting witnesses being at the bottom of the attestation clause:—*Held*, on motion, that the signature was so placed beside or opposite to the end of the will that it was apparent, on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will, and that the will was therefore entitled to probate under the 15 Vict. c. 24, s. 1. In the Goods of Williams - - - - - - 4

9. —— *Re-execution with Residuary Legatee as Attesting Witness—Presumption of re-execution rebutted.*] A. duly executed a will in 1837, appointing B., her nephew, an executor and residuary legatee. On the 20th of May, 1861, being desirous to deliver the will and her deeds to B. for safe custody in the presence of a witness, C. was sent for, and in his presence she delivered the will and deeds to B., saying she wished him to be a witness to such delivery. Before the delivery she subscribed her name at the foot of the will, and C. and B. subscribed theirs, the latter with the prefix of the word "executor." A. gave no reason for signing her name, and said nothing to B. and C. about being witnesses to her will:—*Held*, that what took place on the 20th of May, 1861, was not a re-execution of the will, and that the will was entitled to probate by virtue of the original execution. Dunn *v.* Dunn - - - - - 277

10. —— *Signature at Foot or End—Clause following Signature—Incorporation by reference.*] A will contained a reference to executors "hereinafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature:—*Held*, that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed. In the Goods of Dallow [189

—— Confirmation - - - - - 673
See Will not duly Executed.

—— Declaration — Evidence—Presumption 281
See Will Destroyed. 1.

EXECUTION OF WILL—*continued.*

—— Interlineations - - - - 307
See Interlineations.

—— Mistake in date—Evidence - 8, 139
See Mistake in Will. 1, 2.

—— Signature—Witness - - - 678
See Signature of Witness.

—— Signature in attestation clause - 653
See Signature in Attestation Clause.

—— Signature under attestation clause - 661
See Signature under Attestation Clause.

—— Testamentary paper - - - 630
See Testamentary Paper. 5.

EXECUTOR — Appointment — Executors not named in will - - - - 556
See Appointment of Executor. 1.

—— Appointment—Petition—Receiver - 654
See Appointment of Executor. 2.

—— Appointment—Substituted executor 458
See Appointment of Executor. 3.

—— Appointment—Will of realty only 325, 555
See Will of Realty only. 1, 2.

—— Chain of representation—Probate—Practice
See Chain of Executors. [723

—— Foreign - - - - - 450
See Foreign Probate.

—— Nude—Costs - - - - 118
See Improperly Propounding Will.

—— Renunciation - - - 303, 634
See Renunciation of Administration. 2. Renunciation by Executor.

—— Revocation of appointment - - 628
See Revocation of Appointment of Executors.

EXECUTOR ABROAD—*Will—Property sworn below its value—Probate not sealed—Affidavit of an Agent—Practice.*] The deceased died domiciled in a foreign country, in which also the executor resided. The usual affidavits were forwarded to and made by the executor, and returned to this country. Before the probate passed under seal, it was discovered that the value of the property in England had been understated in the affidavits.—The Court allowed probate to issue, with a stamp to cover the full value of the property of the deceased, on an affidavit by the agent of the executor in England being filed explanatory of the mistake, and of the real value of the personal estate liable to probate duty. In the Goods of D. F. de Angulo y Urruela - - 598

EXECUTOR ACCORDING TO THE TENOR.] A testator by the first clause of his will directed his debts and funeral and testamentary expenses to be paid, and then gave all his personal estate to certain persons on trust, to convert into money, get in and receive it in such manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture which he gave to one of his daughters; —*Held*, that the trustees were executors according to the tenor. In the Goods of Baylis 21

EXECUTOR, FOREIGN—Grant under 20 & 21 Vict. c. 77, s. 73 - - - - 450
See Foreign Probate.

EXECUTOR INTERMEDDLING—*Will — Citation to take Probate—Failure to do so—Attachment—Practice.*] The executors appointed in the will of a deceased intermeddled in the estate, but did

EXECUTOR INTERMEDDLING—*continued.*
not take probate of the will. Having been cited to do so, and not having obeyed the citation within the time limited by it, an attachment was applied for against them.—The Court refused to order an attachment in the first instance, but directed that a peremptory order should be served upon them to take probate within ten days. MORDAUNT *v.* CLARKE - - - - - - 592

EXECUTOR OUT OF JURISDICTION — *Limited Grant to Father and Guardian of Legatees*—38 *Geo.* 3, *c.* 87; 20 & 21 *Vict. c.* 77, *s.* 74; 21 & 22 *Vict. c.* 95, *s.* 18.] The executor being out of the jurisdiction, the Court made a grant of administration, with the will annexed, to the father and guardian of infant legatees, limited to the interest of those legatees in the unadministered estate, under the 38 Geo. 3, c. 87, and the 20 & 21 Vict. c. 77, s. 74, and the 21 & 22 Vict. c. 95, s. 18. IN THE GOODS OF HAMPSON - - 1

EXPERT—Will—Interlineation - - 307
See INTERLINEATIONS.

"FOOT OR END"—Will - - - 209
See EXECUTION OF WILL. 3.

FOREIGN ADMINISTRATION—Deed of gift—Practice - - - - 183
See ADMINISTRATION WITH WILL ANNEXED. 1.

FOREIGN COURT — Requisition — Evidence — Practice - - - - 153
See DEPOSITION OF FOREIGN WITNESS.

FOREIGN EXECUTOR—Grant under 20 & 21 Vict. c. 77, s. 73 - - - 450
See FOREIGN PROBATE.

FOREIGN LAW—Will—Execution - 673
See WILL NOT DULY EXECUTED.

FOREIGN PROBATE—*Will—Grant to Foreign Executor under* 20 & 21 *Vict. c.* 77, *s.* 73.] A testator at the time of his death was domiciled in New South Wales, and the Court of New South Wales granted probate of his will to A. as executrix according to the tenor. A. was not entitled to the grant as executrix according to the tenor, by the law of England; but the Court, under s. 73 of 20 & 21 Vict. c. 77, decreed administration with the will annexed to A. as the person entitled to administer under the grant of the Court of the country of domicil. IN THE GOODS OF EARL 450

FOREIGN PROPERTY—Will - - 449
See WILL OF PROPERTY ABROAD.

FOREIGN WITNESS—Deposition—Practice 153
See DEPOSITION OF FOREIGN WITNESS.

FUNERAL EXPENSES—Administration to creditor - - - - - 314
See ADMINISTRATION TO CREDITOR. 1.

GENERAL GRANT—Limited administration 350
See LIMITED ADMINISTRATION. 1.

GUARDIAN AD LITEM—*Testamentary Suit—Next of Kin of Minor interested—Citation.*] The Court refused to appoint the paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother in reference to the validity of the will of the minor's father, without first citing the mother to shew cause why such an appointment should not be made. IN THE GOODS OF JENKINS - - - 690

GUARDIAN OF INFANT—*Administration—Administration Bond—Creditors—Justifying Security.*] The guardian of an infant, sole next of kin of an intestate, is entitled to take administration of his effects, in preference to creditors. The general rule is, that creditors are not entitled to require the next of kin, or the guardians of the next of kin, to give justifying security; and a very strong case ought to be made out before a departure from the rule is allowed. JOHN *v.* BRADBURY - 245

2. —— *Dissolution of Marriage—Settlements—Children Provided for under their Father's Will—Wife's Power of Appointment by Will.*] The petitioner, the husband, died after a decree absolute had been made to dissolve his marriage with the respondent. He executed a will by which he excluded some of his children from participation in certain property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate.—The Court, whilst it extinguished the respondent's life interest in her husband's property, refused to compel her, out of her separate income and estate, which was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children. An executor of a deceased petitioner cannot, as such, petition for an alteration of the settlements. The guardian of the minor children is the proper person to do so. SMITHE *v.* SMITHE - - - - - - 587

—— Appointment—Suit of infant under Legitimacy Declaration Act - - 328
See LEGITIMACY. 3.

—— Executor out of jurisdiction—Limited administration - - - - 1
See EXECUTOR OUT OF JURISDICTION.

GUARDIAN OF LUNATIC—Nullity of marriage
See NULLITY OF MARRIAGE. 4. [335

HEADING OF AFFIDAVIT—Practice - 364
See AFFIDAVIT VERIFYING PETITION.

HEARING IN CAMERA—*Dissolution of Marriage—Practice.*] Under the 22nd section of 20 & 21 Vict. c. 85, the Court may hear a suit in camerâ, if it be brought for nullity of marriage, or judicial separation, but there is no authority given to the Court by the statute to hear a petition for dissolution of marriage except in open court. C. *v.* C. 642

HEIR — Citation — Proof of will in solemn form - - - - 101, 311
See CITATION OF HEIR-AT-LAW. 1, 2.

IDENTITY OF WIFE—Confrontation - 222
See CONFRONTATION. 1.

IMPOTENCE—Nullity of marriage 127, 460, 552
See NULLITY OF MARRIAGE. 1, 2, 3.

IMPROPERLY PROPOUNDING A WILL—*Costs—Nude Executor.*] The fact that a person who has improperly propounded a testamentary paper is a nude executor, is no ground for relieving him from his liability to condemnation in costs. RENNIE *v.* MASSIE - - - - - 118

INCOME—Guilty wife—Marriage settlement 440
See MARRIAGE SETTLEMENT.

INCONSISTENT WILLS—Revocation - 57
See REVOCATION OF WILL. 5.

INCORPORATION OF DOCUMENT—*Deed not produced—Probate without Incorporation.*] A testator disposed of his residue according to the trusts contained in a certain deed to which he was not a party, and in which he had no interest. The persons interested under those trusts, and who had the custody of the deed, refused to produce it or to allow a copy to be made of any part of it for the purpose of being incorporated in the probate.—The Court directed probate of the will to issue without the incorporation of the deed, or of any part thereof. In the Goods of Sibthorp - - - 106

2. —— *Instructions.*] The testator, in his will, desired that instructions previously given by him the same day to an attorney's clerk, should be carried out. The instructions were oral, but the clerk had at the time made short notes of them in testator's presence:—*Held*, that the notes could not be included in the probate. In the Goods of Pascall - - - - - 606

3. —— *Lists in Existence at Time of Execution of Will, but not so described in Will—Parol Evidence—Incorporation.*] The testatrix by her will bequeathed the residue of her property, save and except such articles of "furniture, &c., as shall be ticketed or described in a paper in my own handwriting, to shew my intention regarding the same." When she instructed her attorney to draw the will, she produced to him two lists which she said was the paper she intended to refer to. At the time when the will was executed they were not shewn to the attesting witnesses, but at the time when a second codicil to the will was executed they were seen by the witnesses, but the testatrix did not make any verbal reference to them:—*Held*, that, as the will did not describe the lists as then existing, parol evidence was inadmissible to prove that fact, and that the lists therefore must be excluded from probate. In the Goods of Sunderland 198

4. —— *Reference.*] A testatrix made a will contained on three pages of a foolscap sheet. The first page only, which contained a formal beginning and ending, was duly executed. The dispositive part on this page was in these words: I do hereby bequeath the following sums to my sons and daughters hereunder named, and I declare the undermentioned sons and daughters to be my executors." At the bottom of the second page there was a specific bequest to one daughter by name, and a bequest of her goods and chattels to her children generally, and not by name. At the top of the third page there was a specific bequest of her money to her daughter by name. The second page was written in September 1861, and the third page was written by one of the attesting witnesses immediately before the execution of the first page:—*Held*, that the testatrix did not, in the first page of the will, refer with such distinctness to a paper then in existence as to entitle pages two and three to probate. In the Goods of Watkins - 19

—— Will - - - - - 189

See Execution of Will. 10.

—— Republication of will—Codicil - 201

See Republication of Will.

INDORSEMENT—Probate—Wrong date—Alteration

See Wrong Date. [664

INDORSEMENT OF SERVICE ON CITATION—*Practice—Rule* 13.] A citation cannot be filed in the registry without an endorsement thereon of personal service, as required by the Rule 13; but the Court can dispense with that rule, and direct the citation to be filed, notwithstanding the absence of such endorsement. Coghill *v.* Coghill 26

INDORSEMENT OF SERVICE ON CITATION—*continued.*

INFANT: *See* Children.

INSANITY—Change of domicile - - 611

See Change of Domicile.

—— Insane delusions - - - 344

See Costs out of Real Estate.

—— Nullity of marriage—Guardian - 335

See Nullity of Marriage. 4.

—— Testamentary capacity - - - 398

See Testamentary Capacity.

—— Will—Presumption—Revocation - 608

See Lost Will. 1.

INSERTION OF CLAUSE IN CODICIL—*Probate—Practice.*] Where a codicil has been read over to a capable testatrix and duly attested by her, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her, and by his inadvertence.—The Court stated the general rules which since the Wills Act ought to govern its action in reference to a duly executed paper. Guardhouse *v.* Blackburn - - - 109

INSPECTION OF PERSON — Order — Refusal to submit—Attachment - - 639

See Nullity of Marriage. 1.

INSUFFICIENT ANSWER—*Alimony—Statement of Average Income.*] An answer to a petition for alimony, setting out the average income of the husband for several years, and not setting out his income during the three years previous to the commencement of the suit:—*Held*, to be insufficient. Williams *v.* Williams - - - 370

INTEREST SUIT — *Unsuccessful Party—General Rule as to Costs—Exception to Rule.*] In interest suits the unsuccessful party is, as a general rule, condemned in costs. But where the only issue raised was as to the fact of the marriage of the defendant, who gave to the plaintiff's attorney false information as to the place of her marriage, and whose own attorney, although in possession of the certificate of the marriage, returned no answer to two letters he received from the plaintiff's attorney asking for the production of the certificate to save further expense, and only produced it to him on the day of the trial, the Court refused to condemn the plaintiff, the unsuccessful party, in costs. Wiseman *v.* Wiseman - - - 351

INTERLINEATIONS—*Will—Evidence that they were made before Execution—Expert's Evidence.*] Some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will.—On that evidence the Court admitted them to probate. In the Goods of Hindmarch - - - 307

—— Will—Prescription - - - 543

See Words carrying Residue.

INTERVENTION—*Practice—Pleading—Right of Counsel for two sets of Parties in the same interest to take part in Trial—Misconduct conducing to Adultery—Decree absolute after Verdict—Death of Parties before a Decree—Costs of Intervention.*] The Queen's Proctor intervening in a suit under the 7th section of the 23 & 24 Vict. c. 144, and alleging collusion, is at liberty in the same plea to allege the suppression of material facts or any other matters in opposition to the decree. The same issues being raised by the Queen's Proctor and by other interveners, the case was conducted by counsel for the Queen's Proctor, and the Court refused to allow counsel for the other interveners to address the jury although they were allowed to examine and cross-examine the witnesses. The misconduct conducing to adultery intended by the 31st section of the 21 & 22 Vict. c. 85, is not mere carelessness. Before a husband is found guilty of such misconduct, it must be proved that there was an intimacy between the respondent and the co-respondent of such a character as to be distinctly dangerous, that he actually knew so much of the intimacy as to perceive the danger, and that he either purposely or recklessly disregarded it, and forbore to interfere. After the trial by a jury of issues arising from an intervention, the Court will not make a decree absolute immediately after a verdict in favour of the petitioner, but will postpone it until the time has expired for an application for a new trial.—The Court made a decree absolute, notwithstanding a suggestion supported by affidavits, that the respondent and co-respondent were dead; the evidence before it not being sufficient to enable it to arrive at a conclusion whether they were dead or alive.—*Quære*, whether the Court has power to condemn an unsuccessful intervener in the costs of his intervention. Dering *v.* Dering - 531

—— Custody of children—Costs - - 437
See Custody of Children. 1.

—— Custody of children—Settlements - 39
See Custody of Children. 3.

—— Opposition to will abandoned - - 456
See Opposition to Will Abandoned.

—— Right to propound will - - 549
See Right to Propound Will.

INTERVENTION OF QUEEN'S PROCTOR—*Alimony—Costs—Dismissal of Wife's Petition.*] A wife obtained a decree nisi for the dissolution of her marriage, with costs, against the respondent. Before that decree was made absolute, the Queen's Proctor intervened, and filed affidavits proving that she had committed adultery whilst the suit was pending, and the decree was thereupon rescinded, and the petition dismissed:—*Held*, that the wife, having obtained an order for alimony pendente lite, was entitled to an attachment against the respondent for non-payment of the arrears of alimony up to the date when she was found guilty of adultery.—*Held*, also, that she was entitled to enforce the payment by the respondent of all costs which had been taxed, and ordered to be paid up to the same date, including the costs of the hearing, although they had not been taxed. Whitmore *v.* Whitmore - 96

2. —— *Costs of Unsuccessful Intervention*—23 & 24 *Vict. c.* 144, *s.* 7.] The Court has no power to condemn the Queen's Proctor in the costs of an unsuccessful intervention under the 7th section of the 23 & 24 Vict. c. 144. Wilson *v.* Wilson 180

INVENTORY AND ACCOUNTS—*Administration—Ecclesiastical Courts—Jurisdiction*—20 & 21 *Vict. c.* 77, *s.* 87—21 & 22 *Vict. c.* 95, *s.* 15.] The Court has no jurisdiction to compel administrators, who have taken out administration in an ecclesiastical court, to file inventories and accounts in the Registry of the Court. Such inventories and accounts are still, by virtue of the 87th section of the Probate Act, 1857, returnable only into the Court of Chancery. But the Court will grant a rule nisi to shew cause why a bond given in the ecclesiastical courts should not be assigned for breach of the condition without further proceedings, on being satisfied on affidavit that no inventory and account has been returned into the Ecclesiastical Court or into the Court of Chancery. Bouverie *v.* Maxwell - - 272

ISSUE OF MARRIAGE—Marriage settlement 231, [495, 711
See Marriage Settlement. 2, 3, 4.

JOINT GRANT OF ADMINISTRATION—*Widow and one of next of kin—Consent of Minors.*] The consent of next of kin, who are minors, and some of them of tender years, is not sufficient to justify the Court in making a joint grant of administration to the widow and one of the other next of kin, unless there are special circumstances for departing from the general practice of the Court. In the Goods of Newbold - - - 285

—— 20 & 21 Vict. c. 77, s. 73 - - 459
See Administration de bonis non. 1.

JUDGE'S NOTES—Evidence — Deceased witness
See Judgment in Previous Suit. 1. [514

JUDGMENT IN PREVIOUS SUIT—*Dissolution of Marriage — Adultery of Petitioner — Estoppel — Discretionary Bar — Practice — Examination of Petitioner—Evidence—Judge's Notes of Evidence of Deceased Witnesses—Right of Reply*—20 & 21 *Vict. c.* 85, *ss.* 27, 29, 31, & 43.] A petitioner established his wife's adultery in a suit for dissolution of marriage, but the co-respondent established the petitioner's adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents. The Queen's Proctor intervened, and alleged the judgment against the petitioner in the previous suit, and further alleged the fact of the petitioner's adultery. The jury found that the petitioner was not guilty of the adultery charged. But the Court held that the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed.—The Court, in the exercise of the discretion conferred on it by 20 & 21 Vict. c. 85, s. 31, granted a decree nisi, notwithstanding the judgment against the petitioner in the former suit, the act of adultery, if committed, being an isolated one and unconnected with the respondent's adultery, and the finding of the jury in the second suit, acquitting the petitioner, having thrown doubt upon his guilt. In a suit for dissolution where the respondent did not appear, the Court allowed the petitioner to be examined, under the 43rd section, and to give evidence upon the issue of his own adultery raised by the Queen's Proctor.—*Semble*, upon a second trial of the same issues, the judge's notes of the evidence of deceased witnesses who were

JUDGMENT IN PREVIOUS SUIT—*continued.*
examined on the first trial are not admissible in evidence except by consent. In a suit for dissolution no issue was raised as to the respondent's adultery, but the Queen's Proctor intervening, pleaded various pleas, and after the petitioner's case was closed, called evidence to prove them. —Evidence having been called on behalf of the petitioner, it was held that, although the petitioner had begun, the Attorney-General on behalf of the Queen's Proctor had the right of reply. Conradi *v.* Conradi - - - - 514

2. —— *Estoppel—Petition for Judicial Separation charging Cruelty—Subsequent Petition for Dissolution charging the same Cruelty coupled with Adultery.*] A wife petitioned for judicial separation on the ground of cruelty, and the charges of cruelty being traversed by the husband, the Court found that they were not proved and dismissed the petitioner:—*Held*, that she was estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution. Finney *v.* Finney - - 483

JUDICIAL SEPARATION—Access to children 167
See Access to Children.

—— Adultery of husband—Misconduct of wife
See Misconduct of Wife. 1. [77

—— Alimony - - - - -
See Cases collected under Alimony pendente Lite.
Alimony, Permanent.

—— Costs of wife—Charge of cruelty not proved
See Charge of Cruelty not proved. [300

—— Cruelty of husband - - - 178
See Cases collected under Cruelty of Husband.

—— Custody of children—Maintenance - 715
See Custody of Children. 4.

—— Desertion - - - - 93
See Cases collected under Desertion by Husband.

—— Evidence—Adultery - - - 37
See Evidence of Adultery. 2.

—— Examination of wife - - - 125
See Examination of Wife.

—— Petition for reversal of decree - - 169
See Petition for Reversal of Decree.

—— Order to attend at hearing - - 629
See Order to Attend at Hearing.

—— Previous decree—Husband's subsequent adultery - - - - 237
See Cruelty of Husband. 6.

—— Settled property—Permanent allowance 709
See Alimony, Permanent. 2.

JURISDICTION—County court costs 95, 604
See County Court Jurisdiction. 1, 2.

—— Custody of children - - - 221
See Custody of Children. 2.

—— Executor out of—Limited grant of administration - - - - - 1
See Executor out of Jurisdiction.

JURISDICTION OF PROBATE COURT—County court - - - - - 95
See County Court Jurisdiction. 2.

—— Inventory and accounts - - 272
See Inventory and Accounts.

JURISDICTION OF PROBATE COURT—*continued.*

—— Will—Costs out of real estate - - 344
See Costs out of Real Estate.

JURY—Discharge without verdict—Costs - 467
See Order to pay Damages and Costs.

JUSTIFYING SURETIES—*Administration—Receiver appointed by the Court of Chancery.*] The Court declined to dispense with justifying sureties, although a receiver of the estate had been appointed by the Court of Chancery, in accordance with the prayer of a bill filed for that purpose, on the ground that it was not satisfied that the Court of Chancery would continue to have the management and control of the estate after the grant of administration had issued. Jackson *v.* Jackson 12

—— Administration—Guardian of infant 245
See Guardian of Infant. 1.

—— Administration—Practice - - 287
See Protection Order.

KNOWLEDGE AND APPROVAL OF CONTENTS—*Will—Plea.*] It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents. Hastilow *v.* Stobie - - - - 64

2. —— *Will—Plea—Notice—Rule* 41—*Practice.*] That the testator knew and approved of the contents of a will propounded is part of the burthen of proof assumed by the person who propounds it, and, consequently, the next of kin who oppose a will may cross-examine the witnesses produced in its support on that matter, as well as upon the capacity of the testator, or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules. Cleare *v.* Cleare - - - - 655

3. —— *Will—Pleading—Evidence.*] If it be proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will be held to extend to every part of the will. Atter *v.* Atkinson - - - - 665

—— Will—Costs - - - - 359
See Unsuccessful Opposition to Will. 3.

LEAVE TO APPEAL—Administration - 186
See Administration Bond. 4.

LEAVE TO APPEAR—Practice—Confrontation
See Confrontation. 2. [24

LEAVE TO PROCEED WITHOUT CO-RESPONDENT—*Wife's confession of Co-respondent's Name—No Evidence against Co-respondent—20 & 21 Vict. c.* 85, *s.* 28—*Rule* 4.] The Court will allow a petitioner to proceed without making the alleged adulterer a co-respondent, where no evidence can be obtained against him, the only evidence that he is the adulterer being the wife's confession. Jinking *v.* Jinking - - - - 330

—— Practice - - - - - 464
See Adultery with Person Unknown.

LEGATEE—Residuary—Administration 591
See Administration to Creditor. 3.

LEGITIMACY — *Legitimacy Declaration Act—Practice—Divorce Rules—Rule 45—Motion for New Trial.*] The 45th Divorce Rule, which directs that every application for a new trial, in respect of causes tried before a jury, is to be lodged in the registry within one month from the day on which the cause was tried, does not apply to a motion for the new trial of issues in a suit for a declaration of legitimacy, which have been tried at the assizes. Watson *v.* The Attorney General 27

2. —— *Legitimacy Declaration Act*, 1858—*Practice—Trial by Jury—Commission to examine Witnesses abroad.*] The Court cannot make an order for the trial by a jury of a petition presented under the Legitimacy Declaration Act, 1858, unless there is some issue for the jury.—Where the Attorney General had filed an answer to such a petition, which did not traverse the allegations contained in it, and no other answer to it had been filed, the Court refused to order it to be tried by a jury until the Attorney General had amended his answer by inserting a traverse and issue had been joined. When a motion is made for an order for a commission to examine witnesses abroad, in a suit for declaration of legitimacy, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine. Ryves *v.* The Attorney General - - - - 23

3. —— *Legitimacy Declaration Act* (21 & 22 *Vict. c.* 93)—*Suit by Infant—Appointment of Guardian—Practice.*] The Court refused to appoint a guardian to an infant, for the purpose of presenting a petition on his behalf for a declaration of legitimacy, until the matter had been referred to the registrar, to ascertain whether the institution of the suit was likely to be of benefit to the infant. In the Matter of the Petition of Chaplin 328

LEGITIMACY DECLARATION ACT, 1858
See Legitimacy. 1, 2, 3. [27, 23, 328

LIEN—Alimony—Attorney - - - 254
See Lien on Alimony.

—— Proctor—Revocation of administration 728
See Revocation of Administration.

LIEN ON ALIMONY—*Costs—Lien of Attorney.*] An attorney retained by a married woman in a matrimonial suit has a lien for costs incurred on her account, including costs disallowed on taxation as between her and her husband, but allowed as between attorney and client, upon all moneys received by him on her account in the course of the suit. This lien extends to alimony in the hands of the attorney. *Ex parte* Sarah Bremner 254

LIMITATIONS, STATUTE OF—Administration to creditor - - - - 288
See Administration to Creditor. 4.

LIMITED ADMINISTRATION—*General Grant—Rule* 30.] Where the person entitled to a general grant of administration with the will annexed, was also an appointee by the same will to a fund of 2000*l.* in settlement, and the general estate of the testatrix, who died insolvent, did not amount to 5*l.*, the Court declined to make a limited grant to the appointee on the suggestion that, by taking a general grant, he rendered himself liable to be harassed with actions by the testatrix's creditors. In the Goods of Lady Catherine Somerset 350

LIMITED ADMINISTRATION—*continued.*

2. —— *Person entitled to Grant abroad—Immediate Grant necessary—20 & 21 Vict. c.* 77, *s.* 73.] At the time of the death of an intestate his only next of kin was in New Zealand. The Court, upon being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a grant of administration to the sister of the intestate, under the 73rd section of the 20 & 21 Vict. c. 77, for the use and benefit of the next of kin, limited until such time as the grant should be made to the next of kin or his lawful attorney, and ordered the administratrix to give justifying security. In the Goods of Cholwill - 192

—— Executor out of jurisdiction - - 1
See Executor out of Jurisdiction.

LIMITED PROBATE—Married woman - 454
See Will of Married Woman. 2.

LIS ALIBI PENDENS—*Testamentary Suit—Pleas—No Plea as to Domicile—Suspension of Proceedings—Leave to Amend.*] The plaintiff having propounded the will of the deceased, the defendant pleaded the usual pleas, but none as to the domicile of the deceased. Issue having been joined, the cause was ordered and the day fixed for trial by a special jury.—The Court refused to order the proceedings in this Court to be suspended, on an affidavit by the defendant that the deceased's domicile was in France, and that proceedings had been instituted in the proper court of that country to try the validity of the will in dispute. Further, it refused to allow the pleadings to be amended, in order to raise the question of jurisdiction on the amended pleadings. Duprez *v.* Veret - 583

LOST WILL—*Presumption as to Revocation—Insanity of Testator after Execution—No Evidence of Destruction.*] The presumption that a will which was in a testator's custody up to the time of his death, and cannot be found after his death, was destroyed by him animo revocandi, does not apply to a case where the testator became insane after the execution, and continued insane until his death. In such a case the burden of shewing that the will was destroyed whilst the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction, the contents of the will are entitled to probate. Sprigge *v.* Sprigge 608

2. —— *Probate of Draft granted on Motion.*] As a general rule, the Court requires the draft or copy of a lost or destroyed will to be propounded before admitting it to probate: but where satisfactory evidence was given of the contents of a destroyed will, of its due execution, of its existence at the time of the testator's death, and of its subsequent destruction, the persons interested under it, and the persons in whose custody it was, not being in any way to blame for such destruction, the Court, with the consent of the only persons interested in the event of an intestacy, granted probate of a draft, on motion. In the Goods of Barber - - - - - - 267

3. —— *Proof of Contents — Executrix condemned in Defendant's Costs for Negligence.*] Where a will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had

LOST WILL—*continued.*
read the will, the parol evidence must be placed side by side with the draft, and out of them the Court will extract the contents of the will to be proved.—Where the substance of a will had been propounded, and, in most particulars established by an executrix, through whose negligence the original will had been lost, the Court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the original will in solemn form. Burls *v.* Burls - - - 472

—— Codicil - - - - - - 72
See Codicil Independent of Will.

—— Evidence — Contents — Declaration of testator - - - - - - 546
See Declaration of Testator.

—— Testamentary paper—Codicil—Revocation
See Testamentary Paper. 2. [685

LUNACY: *See* Insanity.

LUNATIC: *See* Insanity.

MAINTENANCE OF CHILDREN—Custody—Settlements - - - - - 39
See Custody of Children. 3.

MAINTENANCE OF WIFE—Desertion by husband—Reasonable cause - - 489
See Desertion by Husband. 7.

MAINTENANCE, PERMANENT. - - 260
See Permanent Maintenance.

MALFORMATION OF WOMAN—Nullity of marriage - - - - - 31, 639
See Nullity of Marriage. 5, 7.

"MARINER OR SEAMAN BEING AT SEA"—Will—Man-of-war at Portsmouth 540
See Will of Seaman. 2.

MARRIAGE—Evidence - - - 86
See Evidence of Marriage.

—— Nullity of marriage: *See* Nullity of Marriage.

—— Polygamy - - - - - 130
See Mormon Marriage.
Dissolution of Marriage.
Judicial Separation.

MARRIAGE BEFORE DECREE ABSOLUTE—*Matrimonial Suit—Decree Nisi—Adultery—Discretion*—20 & 21 *Vict. c.* 85, *s.* 31.] After a decree nisi in a suit for dissolution of marriage, but before such decree had been made absolute, the petitioner went through a form of marriage, and cohabited, with a female, the Court, being satisfied that he did so in ignorance of the law, and in the bonâ fide belief that his first marriage was finally dissolved, determined that it was a case in which it could exercise the discretion given to it by 20 & 21 Vict. c. 85, s. 31, and made the decree absolute, notwithstanding such adultery of the petitioner. Noble *v.* Noble - - - - - 691

MARRIAGE BEFORE REGISTRAR—Notice—Untrue statements - - - 523
See Nullity of Marriage. 6.

MARRIAGE, DISSOLUTION OF - -
See Dissolution of Marriage.

MARRIAGE, NULLITY OF: *See* Nullity of Marriage.

MARRIAGE, SCOTCH—Belgian domicile—Divorce—Re-marriage - - 487
See Scotch Marriage.

MARRIAGE SETTLEMENT—*Income of Guilty Wife—Principle of Allotment—Distribution between Child and Petitioner—Divorce Amendment Act* (22 & 23 *Vict. c.* 61), *s.* 5—*Form of Order—Practice.*] Where the husband (the petitioner) had only a small official income, and the respondent (by reason of whose adultery the marriage was dissolved) was a lady of considerable fortune, in which she took the first life interest, the Court, in dealing with her marriage settlement, allotted to the husband such a portion of her settled property as would place him somewhat in the status in which he would have been had the union continued. The joint annual income of the parties amounted to 1718*l.* (260*l.* being derived from the petitioner's official appointment, and 1458*l.* from property brought into settlement by the respondent, or bequeathed to her separate use by her mother), the Judge Ordinary having ordered to be paid out of the income of the respondent's settled property 200*l.* per annum to the petitioner, during the minority of the son of the marriage, for his maintenance and education, and on his attaining his majority to the son himself, and 440*l.* per annum to the petitioner, during the joint lives of himself and the respondent:—*Held*, on appeal from the above order, by the full Court, that, where an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody; and that the fact that the original order did not give such a direction was not a ground of appeal, as the order would have been so framed if application for that purpose had been made to the Judge Ordinary at the time of making it. That it is competent to the Judge Ordinary, under s. 5 of 22 & 23 Vict. c. 61, to direct, by the same order, property settled by an ante-nuptial or post-nuptial settlement, to be applied for the benefit of the children of the marriage and the parent. That the amount to be allowed to the husband out of the wife's settled property is in each case a matter of discretion; and that in this case the Judge Ordinary had, in making the allowance, exercised his discretion on right principles and in an equitable manner. March *v.* March 440

2. —— *Issue*—22 & 23 *Vict. c.* 61, *s.* 5.] The Court has no power to deal with marriage settlements under 22 & 23 Vict. c. 61, s. 5, unless there is issue of the marriage living at the date of the order, although there may have been such issue living at the date of the decree of dissolution. Graham *v.* Graham - - - - 711

3. —— 22 & 23 *Vict. c.* 61, *s.* 5—*No living Issue of Marriage.*] The Court has no power to make an order with reference to the application of settled property under the 5th section of the 22 & 23 Vict. c. 61, unless there is issue of the marriage living at the time when the motion for the order is made. Bird *v.* Bird - - - - - 231

4. —— 22 & 23 *Vict. c.* 61, *s.* 5—*No living issue of marriage—Trustees.*] *Held*, by the Judge

MARRIAGE SETTLEMENT—*continued.*
Ordinary, and Montague Smith, J. (Pigott, B., dissenting), that the Court has no power to make an order with reference to settled property under the 5th section of the 22 & 23 Vict. c. 61, unless there are children of the marriage living at the time of the divorce. The trustee of a marriage settlement cannot be heard in support of an application to alter the settlement, but he may be heard in opposition to such an application. Corrance *v.* Corrance - - - 495

—— Children—Custody—Maintenance - 39
See Custody of Children. 3.

MARRIED WOMAN—Administration—Attorney [538
See Administration with Will Annexed.

—— Administration—Notice to husband - 388
See Administration with Will Annexed. 3.

—— Protection order—Administration - 287
See Protection Order.

—— Renunciation of administration—Consent of husband - - - - 595
See Renunciation by Married Woman.

—— Will: *See* Will of Married Woman.

MEMORANDUM OF REVOCATION—*Will—Probate.*] The deceased at the foot of his will wrote the following words:—"This my last will and testament is hereby cancelled, and as yet I have made no other." He signed his name to this memorandum in the presence of two witnesses, who attested the execution.—The Court ordered administration to issue with the memorandum annexed. In the Goods of Hicks - - 683

MINOR: *See* Children.

MISCONDUCT CONDUCING TO ADULTERY 395, [739 531
See Conduct Conducing to Adultery. 1, 2.
Intervention.

MISCONDUCT OF WIFE—*Dissolution of Marriage—Adultery of Husband—Judicial Separation refused—Dismissal of Petition*—20 & 21 *Vict. c.* 85, *s.* 31.] In a wife's suit for dissolution the husband was proved to have been guilty of adultery, but of no other misconduct; and the wife was proved to have been guilty of cruelty, and of wilful separation from the respondent before his adultery and without reasonable excuse, and of wilful neglect and misconduct conducing to his adultery.—The Court refused to grant a decree of judicial separation on the ground of the husband's adultery, and in the exercise of its discretion, under the 31st section of the 20 & 21 Vict c. 85, dismissed the petition. Boreham *v.* Boreham - - 77

2. —— *Practice — Adultery and Cruelty—Answer—Misconduct of Petitioner.*] In answer to a petition by a wife, charging adultery and cruelty, the respondent denied both those charges, and further alleged that the petitioner had habitually treated him with insolence and neglect, and frequently absented herself from home, and refused to inform him where she had been, and constantly set his orders and wishes at defiance; and that she had withdrawn herself from cohabitation for

MISCONDUCT OF WIFE—*continued.*
two years without reasonable cause.—The Court refused to order those allegations to be struck out, being of opinion that the respondent was entitled to give evidence of them, for the purpose of showing that his misconduct, if any, had been caused by that of the petitioner. Hughes *v.* Hughes 219

MISTAKE—Date—Will - - 8, 139, 575
See Mistake in Will. 1, 2.
Revival of Revoked Will.

—— Insertion of clause in codicil—Probate 109
See Insertion of Clause in Codicil.

—— Process—Spelling of name - - 485
See Mistake in Spelling Name.

MISTAKE IN SPELLING NAME—*Practice—Service of Citation and Process—Attachment.*] After a decree for dissolution of marriage with costs against the co-respondent, and an order for the payment of such costs, an attachment was issued against the co-respondent for their non-payment. The person who had been cited and served with the process and notices as the co-respondent throughout the suit, moved to set aside the attachment on the ground that his surname was misspelt and one of his christian names omitted in the citation, and process, and notices:—*Held*, that the co-respondent having taken no step to set the mistake right in the course of the suit, could not at the last moment take advantage of it to invalidate the proceedings, and that the order for an attachment must stand. Churchill *v.* Churchill - - - - - 485

MISTAKE IN WILL—*Ambiguity—Parol Evidence.*] A testator duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth codicil confirmed the will and the four codicils. Parol evidence was admitted to explain the ambiguity of these codicils, and it was proved that the confirmation of the will and four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the will and the fourth codicil. Probate was granted, on motion, of the will and the fourth and fifth codicils only. The fifth codicil appeared on the face of it to be executed on the 30th August, 1861, but the parol evidence admitted to explain its ambiguity, proved that it was in fact executed on the 30th August, 1865.—The Court declined to alter the date appearing on the face of it, but directed probate of it to issue as having been executed on the 30th August, 1865. In the Goods of Thomson - - 8

2. —— *Parol Evidence as to date of Execution—Revocation.*] Parol evidence is admissible to prove that a will was executed on a date other than that which appears upon the face of it. Two wills were propounded, one bearing date on the 27th of February, 1855, and the other on the 11th of December, 1858. There was no ambiguity on the face of either of them, and each of them contained a general clause of revocation.—Parol evidence was admitted to prove that the will bearing date on the 27th of February, 1855, was in fact executed on the 27th of February, 1865, and on that evidence the Court pronounced for the will of 1865, and against the will of 1858. Reffell *v.* Reffell - [139

MODE OF TRIAL—Issues at assizes—Order 89
See Trial of Issues at Assizes.

MODE OF TRIAL—*continued.*
—— Practice — Restitution of conjugal rights [568
See Restitution of Conjugal Rights. 3.
MONEY IN FUNDS—Sequestration—Dividends [622
See Sequestration. 1.
MORMON MARRIAGE—*Polygamy.*] Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations. Hyde *v.* Hyde - - - - - - 130
MOTION FOR NEW TRIAL—Practice—Legitimacy Declaration Act - - 27
See Legitimacy. 1.

NEW TRIAL—Evidence—Cruelty - - 702
See Cruelty of Husband. 2.
—— Intervention—Costs - - - 456
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—— Jurisdiction—County Court—Probate Court [195
See County Court Jurisdiction. 2.
—— Practice—Further evidence - - 344
See Costs out of Real Estate.
—— Practice—Legitimacy Declaration Act 27
See Legitimacy. 1.
NON-APPEARANCE OF DEFENDANT—*Practice — Costs — Defendant who had not appeared condemned in Costs.*] The Court has power to condemn a party who has been cited but has not appeared, in the costs of a testamentary suit. King *v.* Gillard [539
NON CONTENTIOUS, RULE 50 - - 595
See Renunciation by Married Woman.
NOTICE UNDER RULE 41—*Costs—Conditional Notice.*] A conditional notice, that if both the attesting witnesses to a will are produced the parties opposing it only intend to cross-examine the witnesses, is a sufficient notice to protect them against condemnation in costs under Contentious Rule 41. Leeman *v.* George - - 542
—— Undue influence - - - 194
See Unsuccessful Oppositon to Will. 4.
NUDE EXECUTOR—Costs - - - 118
See Improperly Propounding Will.
NULLITY OF MARRIAGE—*Impotence of Husband—Evidence.*] In a suit by a wife for nullity, on the ground of the husband's impotence, the only evidence of the alleged impotence was that of the petitioner, which was contradicted by the respondent. The evidence of the medical witnesses and the report of the inspectors was not inconsistent with either case.—The Court declined to grant a decree on the unsupported testimony of the petitioner. U. (falsely called J.) *v.* J. 460
NULLITY OF MARRIAGE—*continued.*
2. —— *Impotence—Suit after Death of one of the parties to Marriage—Administration to Husband of Intestate.*] The validity of a marriage cannot be impeached, on the ground of impotence, after the death of one of the parties. The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband. A. *v.* B - 559
3. —— *Impotence—Want of Corroborative Evidence—Delay—Wife's Costs—Rule* 159.] In a suit by a woman for nullity on the ground of the man's impotence, the petitioner's evidence that the marriage had never been consummated was neither corroborated nor contradicted, the medical evidence being consistent both with consummation and non-consummation. It appeared that cohabitation had continued for eight years without complaint on the part of the petitioner, and that the separation was caused by the respondent's ill-treatment of her.—The Court found that the charge was not sufficiently proved, and dismissed the petition.—The wife's costs of the hearing of a suit of nullity instituted by her on the ground of the husband's impotence were ordered to be paid by the husband to the extent of the sum for which he had deposited security in the registry, although the petition was dismissed. T. *v.* D. (falsely called D.) - - - - 127
4. —— *Lunatic—Assignment of Guardian—Application for Adjournment of hearing of Suit.*] Where a guardian ad litem had been duly assigned by the registrar to a lunatic, a petitioner in a suit for nullity of marriage, the Court declined during the hearing of the petition to adjourn the case on the application of the respondent, on the suggestion of the petitioner's recovery, and of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, and proceeded to determine the only issue raised by the pleadings, namely, whether the petitioner was of sound mind at the time of the celebration of her marriage. In deciding whether a person has sufficient mental capacity to contract a marriage, the question for the Court is, whether the mind of the contracting party was diseased or not at the time of the contract, and if the evidence establishes that the mind was at the time of entering the contract diseased, the Court will not enter into the consideration of the extent of the derangement.—The Court being satisfied by the evidence that the petitioner was not of sound mind at the time of the celebration of her marriage with the respondent, postponed pronouncing its decree, in order to give the respondent an opportunity, if so advised, of establishing the fact of the petitioner's recovery, and intimated that, if satisfied of her recovery, it would not pronounce a decree of nullity except at her instance. The next of kin having delayed instituting the suit for three years, and the respondent having in the meantime contributed towards the petitioner's support, the Court made no order as to costs. The guardian ad litem, after the lapse of three weeks from the delivery of the judgment, obtained a rule nisi for the respondent to shew cause why a decree of nullity should not be pronounced, and, the respondent not shewing cause against the rule,

NULLITY OF MARRIAGE—*continued.*
the decree of nullity was pronounced. Hancock (falsely called Peaty) *v.* Peaty - - 335

5. —— *Malformation of Woman—Refusal of Woman to submit to Examination—Decree suspended.*] The respondent in a suit for nullity by the man, on the ground of malformation, had not been personally served with the citation, and had never submitted to medical examination, and could not be found, but was supposed to be out of the jurisdiction. No evidence could therefore be given that she was suffering from incurable malformation.—The Court suspended its decree, in order to give the petitioner an opportunity of having her examined if she should hereafter be found within the jurisdiction. T. *v.* M. (falsely called T.) [31

6. —— *Marriage before Registrar—Due Notice—Untrue Statements in Notice*—6 & 7 *Wm.* 4, *c.* 85; 1 *Vict. c.* 22; 19 & 20 *Vict. c.* 119.] The "due notice" required by the Registration Acts for the validity of a marriage before a registrar, is a notice conforming to the formalities provided by the 6 & 7 Wm. 4. c. 85, and the words "due notice" will be satisfied, though the contents of the notice in respect of christian names and residences of the parties, or other details, are not accurate.—There is no analogy between a marriage by banns and a marriage by notice before the registrar. The decisions as to what constitutes undue publication of banns, under the 4 Geo. 4, c. 76, are not therefore applicable to a question of what constitutes undue notice under the Registration Acts.—*Quære*, whether undue publication of banns would invalidate a marriage if, at the time when it was celebrated, there was no person in existence who had a legal right to assent to or dissent from its celebration. Holmes *v.* Simmons (falsely called Holmes) - - - 523

7. —— *Order for Inspection of Person—Refusal to submit—Attachment.*] In a suit of nullity, by reason of the malformation of the woman, the Court made the usual order for the inspection of her person. This order was personally served upon her, but she refused to submit to such inspection.—The Court directed that a motion for an attachment against her should stand over until after the hearing of the petition. B. *v.* L. (falsely called B.) - - - - 639

OPPOSITION TO WILL: *See* Unsuccessful Opposition to Will.

OPPOSITION TO WILL ABANDONED—*Practice—Intervention—Suit continued by Interveners—New Trial — Executor's Costs of first Trial out of Estate.*] After a verdict had been found establishing a will, and a rule nisi had been granted for a new trial, the next of kin opposing it abandoned his opposition. Two other next of kin, who had appeared in the suit, but had not pleaded, were allowed to plead and adopt the proceedings up to the time of the order, in order to carry on the opposition.—Upon a verdict establishing the will being set aside on the ground that it was against evidence, and a new trial granted, the executors who had obtained the verdict were allowed to take their costs out of the estate up to the time of the rule for a new trial being made absolute. Boulton *v.* Boulton - - - - - 456

ORDER—Application of damages - - 36
See Order as to Application of Damages.

—— Mode of trial of issue at assizes - 89
See Trial of Issues at Assizes.

ORDER AS TO APPLICATION OF DAMAGES—*Practice.*] Where it was proved, on the hearing of a petition, that there had been no issue of the marriage, and that at the time of the hearing the respondent was living with the co-respondent, the Court made the order for the payment to the petitioner of the damages assessed against the co-respondent part of the decree nisi, instead of postponing it until the decree absolute. Evans *v.* Evans - - - - - - 36

ORDER FOR INSPECTION OF PERSON—Refusal to submit—Attachment - 639
See Nullity of Marriage. 7.

ORDER FOR PERMANENT PROVISION—*Appeal*—20 & 21 *Vict. c.* 85, *s.* 32—23 & 24 *Vict. c.* 144.] An order for permanent provision for a divorced wife, made under the 20 & 21 Vict. c. 85, s. 32, must form part of the decree dissolving the marriage. In making such an order the Judge Ordinary exercises a power which could only have been exercised by the full Court before the passing of the 23 & 24 Vict. c. 144, and the appeal from the order lies not to the full Court but to the House of Lords. Sidney *v.* Sidney 78

ORDER, PROTECTION: *See* Protection Order.

ORDER TO ATTEND AT HEARING—*Judicial Separation—Wife Petitioner—Adultery—Practice.*] The Court has power under 20 & 21 Vict. c. 85, s. 43, to order a petitioner in a suit for judicial separation, by reason of adultery, to attend at the hearing of the petition. Ross *v.* Ross - 629

ORDER TO PAY DAMAGES AND COSTS—*Bankruptcy—Orders to pay Damages into Court, and to pay Costs to Petitioner—Effect of Adjudication of Bankruptcy, and Order of Discharge upon such Orders*—24 & 25 *Vict. c.* 134, *s.* 149—*Costs of Trial when Jury are Discharged Without Verdict.*] In a suit for dissolution of marriage the co-respondent was ordered to pay into court the damages which had been recovered against him by the petitioner, and also to pay the petitioner's costs. After service of these orders, but before the costs were taxed, the co-respondent was adjudicated a bankrupt on his own petition, and afterwards obtained an order of discharge. Upon an application for an attachment for disobedience to these orders, it was held that the petitioner, being entitled to enforce payment against the co-respondent by process of contempt, was a creditor within the 149th section of the Bankruptcy Act, 1861, both as to the damages and costs. That such damages and costs were debts, proveable under the bankruptcy, and therefore that the order of discharge covered them, and the co-respondent could not be attached for their non-payment.—A jury being unable to agree, were discharged without giving a verdict.—On a second trial the petitioner obtained a verdict, and a decree was pronounced, condemning the co-respondent in costs, but the Court refused to include in these costs the costs of the first trial. Wood *v.* Wood - - 467

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See Revocation of Will. 4.

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PERMANENT MAINTENANCE—20 & 21 *Vict. c.* 85, *s.* 32—*Petition presented after decree nisi—Rules and Orders made by the Judge Ordinary alone—Rule* 96—*Practice.*] The Judge Ordinary has power to make and to alter or revoke rules and orders concerning the practice and procedure of the Court, without the concurrence of the other judges. A petition for an order for permanent maintenance, under the 32nd section of the 20 & 21 Vict. c. 85, must be presented, in accordance with the 96th rule, after the decree nisi, and before the decree absolute; and the 98th rule which requires the respondent to file an answer to it on oath, is a binding rule with which the Court will not dispense except upon special grounds.—The fact that it appears on the face of the petition that the petitioner has a separate income, is not a ground on which the Court will dispense with that rule. Charles *v.* Charles 260

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PETITION FOR REVERSAL OF DECREE—20 & 21 *Vict. c.* 85, *s.* 23—*Decree made in the Absence of Respondent.*] A petition for the reversal of a decree of judicial separation under the 23rd section of the 20 & 21 Vict. c. 85, on the ground that it was obtained in the petitioner's "absence," is good on demurrer, although it alleges personal service on the petitioner of the citation in the judicial separation suit; for the word "absence" means non-appearance in the suit, and not absence without knowledge or notice of the suit. It is not sufficient in such a petition to allege merely the non-appearance of the petitioner, but the petition must further set out the cause of his non-appearance, and must also state circumstances tending to shew that the decree was wrong on the merits. Phillips *v.* Phillips - - - - 169

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POST-NUPTIAL SETTLEMENT—*Dissolution of Marriage—Deed of Separation*—22 & 23 *Vict. c.* 61, *s.* 5.] All deeds, whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of 22 & 23 Vict. c. 61, s. 5, and the Court has power to deal with them. Worsley *v.* Worsley - - - - - 648

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—— Will—Married woman—Revocation 90, 147
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—— Citation of legatees to propound will 316
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PRAYER FOR RELIEF IN ANSWER—*Cross Suits for Restitution and for Dissolution—29 Vict. c. 32, s. 2.*] A decree of restitution of conjugal rights is not the relief for desertion contemplated by the 2nd section of the 29 Vict. c. 32; therefore, a wife who filed an answer to a petition for dissolution of marriage, wherein she denied the adultery charged, and alleged desertion and wilful separation, was not allowed to add a prayer for restitution to the answer. Drysdale *v.* Drysdale - - - - - 365

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—— Revocation—Lost will - - - 608
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PRESUMPTION OF REVOCATION OF WILL—*Not forthcoming at Time of Death—Evidence as to its existence at that Time.*] The presumption that a will in the testator's possession, and not forthcoming after his death, has been revoked, does not arise unless there is evidence to satisfy the Court that it was not in existence, at the time of his death. A will which had been in the testator's custody could not be found in his depositories after his death, but there was evidence of declarations recognizing its existence up to within three weeks of his death; there was no evidence of any change of intention during those three weeks, and the only person who was interested in an intestacy had access to and made a search in the depositories before they were searched by any other person.—Coupling these facts with the non-appearance of the person interested in an intestacy, the Court refused to presume that the will had been revoked, and granted probate of the draft. Finch *v.* Finch - - - - 371

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PROOF OF BIGAMY BY AFFIDAVIT—*Practice.*] If a respondent has been convicted of bigamy, and the witnesses to prove his bigamy reside at a distance, and cannot be produced without considerable expense, the Court will permit such bigamy to be proved by affidavit. Macartney *v.* Macartney - - - - - 259

PROOF OF WILL—Solemn form—Citation of heir at law - - - - 101
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PROSTITUTION OF PETITIONER—*Dissolution of Marriage—20 & 21 Vict. c. 85, s. 31.*] In a suit by a wife for a dissolution of marriage it was proved that the respondent had been guilty of adultery and of cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she obtained by prostitution.—The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the respondent, exercised the discretion given to it by the 31st section of the 20 & 21 Vict. c. 85, by dissolving the marriage, notwithstanding her adultery. Coleman *v.* Coleman - - 81

PROTECTION ORDER—*Married Woman—Administration—Son sole next of kin a minor—Grant to a Guardian elected by him without citing Father—Justifying Sureties.*] Where a married woman, living separate from her husband, having obtained a protection order, died, leaving him and a minor son her surviving, the Court made a grant of administration of her effects to a guardian elected by the son for his use and benefit without citing the father, requiring justifying securities. In the Goods of Stephenson 287

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RENUNCIATION—Will of realty—Appointment of executor - - - - 555
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RENUNCIATION OF ADMINISTRATION—*Grant under s. 73 of 20 & 21 Vict. c. 77.*] The mother of an intestate being willing to renounce her right to a grant of administration, and her husband being in Australia, the Court, without requiring the renunciation of her husband, passed her over and made the grant to the intestate's sister under s. 73 of the 20 & 21 Vict. c. 77. In the Goods of Llanwarne - - - - 306

2. —— *20 & 21 Vict. c. 77, s. 79—Executor—Retractation and Second Renunciation.*] The 79th section of the Probate Act does not apply to an executor who had renounced before that Act came into operation; and the retraction of such renunciation after the act came into operation, and a second renunciation after such retractation, will not bring him within that section. In the Goods of Whitham - - - - - 303
—— Administration to creditor - - 327
See Administration to Creditor. 2.

RENUNCIATION BY EXECUTOR—*Will—Attorney for other Executors—Rule 50 (Rules and Orders, 1862).*] The Court allowed one who had been appointed an executor, and had renounced that office, to take administration with the will annexed as attorney of the other executors, notwithstanding Rule 50 (Rules and Orders, 1862). In the Goods of Russell - - - 634

RENUNCIATION BY MARRIED WOMAN—*Consent of Husband—Grant to Husband as Creditor—Non-Contentious Rule 50.*] A husband may take a grant of administration, with the will annexed, as creditor, although he has signed a renunciation executed by his wife as residuary legatee. In the Goods of Biggs - - - - 595

REPRESENTATION—Chain of executors - 723
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REPUBLICATION OF WILL—*Codicil—Reference in Will to Unexecuted Document—Incorporation.*] The republication of a will by the execution of a codicil, will not of itself entitle an unexecuted paper, written or signed between the date of the will and the date of the codicil, to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. In the Goods of Lady Truro - 201

REQUISITION TO FOREIGN COURT—Evidence—Deposition of foreign witness - 153
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RESIDUARY LEGATEE—Administration—Creditor - - - - - 594
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RESTITUTION OF CONJUGAL RIGHTS—*Answer, alleging Deed of Separation.*] Although a deed of separation is no bar to a suit for restitution of conjugal rights, it may be alleged in answer to an allegation in the petition, that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner. Anquez *v.* Anquez - - - - - 176

2. —— *Answer charging Adultery and praying for Judicial Separation—Evidence of Parties—Decree—6 & 7 Vict. c. 85—14 & 15 Vict. c. 99, ss. 2 and 4.*] A petition for restitution of conjugal rights, to which an answer has been filed charging adultery and praying for a judicial separation, is not a suit or proceeding "instituted in consequence of adultery," and therefore the evidence of the parties is admissible.—When an answer to a petition for restitution of conjugal rights contains a prayer for judicial separation, the respondent has a right to proceed and prove the allegations in the answer on which the prayer is founded, notwithstanding the withdrawal of the prayer for restitution by the petitioner.—A respondent in a suit for restitution of conjugal rights, who alleged adultery of the petitioner and prayed for a judicial separation, was examined in support of the charge of adultery, and a jury found that the petitioner was guilty of adultery. A decree of judicial separation was pronounced on that verdict. Blackborne *v.* Blackborne 563

3. —— *Respondent willing to take his Wife home—Directions as to the Mode of Trial—Practice.*] The wife having filed a petition for restitution of conjugal rights, the husband, in his answer, stated his willingness to takehis wife home.—The Court refused to give directions as to the mode of trial, but ordered the matter to be adjourned into chambers, and that the respondent should file an affidavit in support of the averments in his answer. Crothers *v.* Crothers - - - 568
—— Prayer for relief in answer - - 365
See Prayer for Relief in Answer.

REVIVAL OF REVOKED WILL—*Wills Act—Codicil—Mistaken Reference by Date in Codicil—Proof of Intention to revive.*] A codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, but the codicil

REVIVAL OF REVOKED WILL—*continued.*
must "shew an intention to revive the same" (1 Vict. c. 26, s. 22). In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court with reasonable certainty the existence of the intention. Since the passing of the statute a will cannot be revived by mere implication.—References in codicils to revoked wills by their dates held insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to. In the Goods of Steele. In the Goods of May. In the Goods of Wilson - - - 575

REVOCATION OF ADMINISTRATION — *Revoked Letters of Administration not brought into Registry —Proctor's Lien—Practice.*] The proctors who had obtained a grant of administration with the will annexed held the letters in their hands, having a lien on them for their costs, and declined to deposit them in the Registry for the purpose of being cancelled.—The administrator having been cited, did not show cause against their revocation, and on proof that they were improperly issued, the Court ordered them to be revoked without being brought into the Registry, and further ordered that the person at whose instance they were revoked should bring them into the Registry as soon as they came into his possession, and that the proctors should be served with a copy of the order. Earnes *v.* Durham - - - - 728

REVOCATION OF APPOINTMENT OF EXECUTORS —*Two Wills—"Sole" Executors.*] A testator executed a will in 1856, whereof he appointed W. H. B. and P. B. executors. He executed another will in 1860, referring to and confirming the previous will, whereof he appointed W. H. B. and M. J. B. "sole" executors. Probate was granted of both papers as together containing the last will of the deceased, to W. H. B. and M. J. B. (excluding P. B.), the Court being of opinion that the use of the word "sole" in the will of 1860, indicated an intention to revoke the appointment of executors contained in the earlier will. In the Goods of Baily - - - - - - 628

REVOCATION OF CODICIL—Testamentary paper *See* Testamentary Paper. 2. [685

REVOCATION OF PROBATE—*Duty of Executor as to Revocation of Probate—Citation of Legatees to propound—Practice.*] An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form, or shew cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor. In the Goods of Chamberlain - - - - - - 316

REVOCATION OF WILL—*Codicil.*] A testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequest and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment

REVOCATION OF WILL—*continued,*
of executors and guardians in the will:—*Held*, that the will was not revoked. In the Goods of John Howard - - - - - 636

2. —— *Dependent Relative Revocation—Destruction of a later Will with an intention to revive an earlier one.*] A testator executed a will in 1864 revoking all former wills. In 1865 he destroyed this will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand.—The Court, overruling a dictum in *Dickinson* v. *Swatman* (30 L. J. (P. M. & A.) 84), *held*, that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, there was no revocation. Powell *v.* Powell—Powell intervening - - - - 209

3. —— *Existing, revoked by later Will not existing—Parol Evidence of Contents of later Will.*] A will was found after a testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, and which remained in his custody until his death, and could not then be found, and that he had declared an intention to destroy it.—The Court pronounced for an intestacy. Wood *v.* Wood - - - - - - 309

4. —— *Practice — Amendment — Particulars.*] The defendant having traversed in the first plea the due execution of the will propounded, dated 1862, alleged in the 2nd plea the due execution by the deceased of a later will in 1864, at a time when he was of sound mind, &c.; and in the third plea, that the will of 1862, howsoever executed, had been revoked by the later will; and in the 4th plea, that the will of 1864 had been destroyed by the deceased with the intention of revoking the same.—The Court declined to strike out the 2nd plea, but directed it to be joined to the 3rd plea, so as to form with it one plea, striking out the words "howsoever executed" in the third plea, and also directed the 4th plea to be struck out, reserving to the defendant leave to raise the question therein raised at the trial, if necessary.—The Court refused to order the defendant to insert in the 3rd plea the name of the executors of the will of 1864, that being a matter for particulars. Powell *v.* Powell - - - - 6

5. —— *Two partly inconsistent Wills admitted to Probate.*] If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate.—Where there are two testamentary papers, each professing in form to be the last will of the deceased, the Court in determining whether one or both are entitled to probate must be guided by the consideration, not whether the testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain. Lemage *v.* Goodban - - - - - 57

—— Codicil - - - - - 72
See Codicil Independent of Will.

—— Codicil—Mistake - - - 575
See Revival of Revoked Will.

—— Marriage—Will under power - - 671
See Will under Power of Appointment.

REVOCATION OF WILL—*continued.*
—— Married woman - - - 147
See WILL OF MARRIED WOMAN. 4.
—— Mistake in date of will—Evidence - 139
See MISTAKE IN WILL. 2.
—— Presumption—Destruction - - 281
See WILL DESTROYED. 1.
—— Presumption—Evidence - 371, 608
See PRESUMPTION OF REVOCATION OF WILL.
—— Probate - - - - - 683
See LOST WILL. 1.
MEMORANDUM OF REVOCATION.
—— Testamentary paper—Practice - 53
See TESTAMENTARY PAPER. 4.
—— Revival—Codicil - - - 575
See REVIVAL OF REVOKED WILL.

RIGHT TO PROPOUND WILL—*Pleading—Interveners.*] An executor propounding a will cannot plead in opposition to an earlier will propounded in the same suit any plea but revocation by the will which he propounds. A party who has no interest under a will cannot propound it. A. propounded as executor a will of March, 1867. B., as interested under a will of October, 1865, pleaded in opposition to it, but did not propound the will of October, 1865. C. intervened as interseted under a will of January, 1858, and pleaded in opposition to the will of March, 1867. C. also propounded the will of January, 1858. A. was not allowed to plead to C.'s declaration that the will of January, 1858, was not duly executed, nor that it was revoked by the will of October, 1865. Nor was A. allowed to propound the will of October, 1865. PARTON *v.* JOHNSON - - - 549

RIGHT TO REPLY—Practice - - 514
See JUDGMENT IN PREVIOUS SUIT. 1.

RULE 13—Indorsement of service on citation 26
See INDORSEMENT OF SERVICE ON CITATION.

RULE 50, 1862 - - - 595, 634
See RENUNCIATION BY MARRIED WOMAN.
RENUNCIATION BY EXECUTOR.

RULE 159—Counter-charge of adultery—Costs—Practice - - - - 163
See COUNTER-CHARGE OF ADULTERY.
—— Nullity of marriage—Costs - - 127
See NULLITY OF MARRIAGE. 3.

RULES AND ORDERS - - - 751

ST. LEONARDS' ACT—s. 1 - - - 209
See EXECUTION OF WILL. 3.

SCOTCH MARRIAGE—*Belgian Domicile—Remarriage in Belgium—Belgian Divorce of Belgian Marriage.*] A., an Englishwoman, married B., a Belgian, in Scotland. They afterwards went through a second ceremony of marriage in Belgium. After a cohabitation in Belgium, a competent Belgian tribunal pronounced a decree of divorce, on the ground of mutual consent, purporting to dissolve the Belgian marriage, but not purporting to affect the Scotch marriage. A. afterwards married C. in England, during the lifetime of B.:—The Court *held*, that the Scotch marriage between A. and B. was a valid and subsisting marriage, and, on the petition of C., declared his marriage with A. in B.'s lifetime null and void.—*Quære*, would the English Matrimonial Court have

SCOTCH MARRIAGE—*continued.*
recognized the Belgian decree of divorce by mutual consent, if it had purported to dissolve the Scotch marriage. BIRT *v.* BOUTINEZ (FALSELY CALLED BIRT) - - - - - 487

SCOTCH WILL—Subsequent Scotch marriage—Domicile - - - - 74
See WILL, SCOTCH.

SEAMAN—Bastard—Administration - 15, 119
See ADMINISTRATION OF BASTARD'S ESTATE. 1, 2.
—— Will—Man of war at Portsmouth - 540
See WILL OF SEAMAN. 2.
—— Will—Passenger ship - - - 16
See WILL OF SEAMAN. 1.

SECURITY—Administration—Guardian of infant
See GUARDIAN OF INFANT. 1. [245

SEPARATION—Connivance—Adultery - 734
See CONNIVANCE.
—— Costs of co-respondent—Misconduct of wife
See COSTS OF CO-RESPONDENT. 2. [510
—— Restitution of conjugal rights—Deed 176
See RESTITUTION OF CONJUGAL RIGHTS. 1.

SEPARATION, DEED OF: *See* DEED OF SEPARATION.

SEPARATION, JUDICIAL: *See* JUDICIAL SEPARATION.

SEQUESTRATION—*Money in the Funds—Dividends—20 & 21 Vict. c. 77, s. 25—Testamentary Suit—Costs against the Defendant as Executor and as party—Defendant abroad.*] In a testamentary suit an order was made on the defendant, both as executor of the original defendant and as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, and the defendant being abroad, a writ of sequestration issued against his real and personal estate. A large amount of stock was standing in the books of the Bank of England to the credit of the defendant, as executor of the original defendant in the suit, and a dividend was due thereon:—*Held*, that the Court of Probate had no authority to make an order upon the Bank of England (without their assent) to pay over such dividends to the sequestrators. CRISPIN *v.* CUMANO [622

2. —— *Practice—Pension of Retired Indian Officer.*] The Court has power to issue a sequestration, although no attachment had previously been issued. The pension of a retired officer in the Indian navy received solely in respect of past services, held to be liable to sequestration. DENT *v.* DENT - - - - - 366
—— Permanent alimony—Rent charge - 215
See ALIMONY, PERMANENT. 3.

SERVICE—Indorsement on citation - 26
See INDORSEMENT OF SERVICE ON CITATION.

SETTLED PROPERTY — Permanent alimony — Rate of allowance - - - 709
See ALIMONY, PERMANENT. 2.

SETTLEMENT—Dissolution of marriage—Guardian of children - - - 587
See GUARDIAN OF INFANT. 2.

SETTLEMENT, MARRIAGE - 231, 440, 495, 711
See MARRIAGE SETTLEMENT. 1, 2, 3, 4.

SETTLEMENT OF DAMAGES—Decree absolute
See Decree Absolute. 2. [168

SIGNATURE—Administration bond - 301
See Administration Bond. 2.

—— Testamentary paper - - - 630
See Testamentary Paper. 5.

—— Will—Attestation - - - 143
See Execution of Will. 2.

—— Will—Execution - - - 189
See Execution of Will. 10.

—— Will—Position of signature - 4, 302
See Execution of Will. 6, 8.

SIGNATURE IN ATTESTATION CLAUSE—*Will—Execution—Second Signature beneath Names of Witnesses.*] The testator having informed the witnesses that he wished to make his will filled up a printed form in their presence, and wrote his name in the attestation clause thereto. After the witnesses had signed their names, the testator again wrote his name beneath their signatures.—The Court granted probate of the will, with the omission of the testator's second signature. In the Goods of Casmore - - - 653

SIGNATURE OF WITNESS—*Will—Execution—Presence of Deceased—Adverse Evidence of Surviving Attesting Witness.*] The deceased signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the deceased, an affidavit was required as to certain interlineations which appeared on the face of the will, and such affidavit was prepared by the clerk on a printed form, the blanks being filled in by him. This affidavit was sworn to by the attorney and contained the usual clause of due execution, more especially that the witnesses had signed their names in the presence of the deceased. After the death of the attorney, the clerk for the first time gave information that the will was not signed by the witnesses in the presence of the deceased, but in the attorney's office, and at the trial gave evidence to the same effect. No other witness, either to disprove or corroborate this statement, was produced.—The Court, on a review of all the circumstances, declined to act upon the recollection of the surviving witness, and decreed probate of the will as duly executed. Wright *v.* Rogers - - - - - - 678

SIGNATURE UNDER ATTESTATION CLAUSE—*Will—Residue—Omission of Name in Probate—Practice.*] The deceased made a will in favour of one person only, and after bequeathing to her certain specified articles of property, he added "and all other chattels;" these last words were held to cover the general residue.—Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the Court will receive evidence to explain why such signature was written, and if it be satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted in the probate. In the Goods of Sharman - - - 661

"SOLE" EXECUTORS—Revocation of appointment of executors - - - 628
See Revocation of Appointment of Executors.

SOLEMN FORM—Proof of will—Citation of heir at law - - - 101, 311
See Citation of Heir at Law. 1, 2.

STATUTE OF LIMITATIONS—Administration to creditor - - - - 288
See Administration to Creditor. 4.

STATUTES:—

29 Car. 2, c. 3, s. 23 - - - 16
See Will of Seaman. 1.

35 Geo. 3, c. 87 - - - - 1
See Executor out of Jurisdiction.

1 Wm. 4, c. 22 - - - - 720
See Commission to Examine Witness.

6 & 7 Wm. 4, c. 85 - - - - 523
See Nullity of Marriage. 6.

1 Vict. c. 22 - - - - - 523
See Nullity of Marriage. 6.

1 Vict. c. 26, s. 9 - - - - 143
See Execution of Will. 2.

—— —— s. 11 - - - 16, 540
See Will of Seaman. 1, 2.

—— —— s. 18 - - - 319, 671
See Will of Married Woman. 5.
Will under Power.

—— —— s. 20 - - - - 147
See Will of Married Woman. 4.

—— —— s. 22 - - - - 575
See Revival of Revoked Will.

6 & 7 Vict. c. 85 - - - - 563
See Restitution of Conjugal Rights. 2.

14 & 15 Vict. c. 99, ss. 2, 4 - - 563
See Restitution of Conjugal Rights. 2.

—— —— s. 4 - - - - 233
See Cross-examination of Parties as to Adultery.

15 & 16 Vict. c. 24, s. 1 - - 4, 209, 302
See Execution of Will. 3, 6, 8.

16 & 17 Vict. c. 83, s. 5 - - - 233
See Cross-examination of Parties as to Adultery.

17 & 18 Vict, c. 125, s. 1 - - - 89
See Trial of Issues at Assizes.

19 & 20 Vict. c. 119 - - - 523
See Nullity of Marriage. 6.

20 & 21 Vict. c. 77, s. 25 - - - 622
See Sequestration. 1.

—— —— s. 32 - - - - 720
See Commission to Examine Witness.

—— —— ss. 35, 38 - - - 89
See Trial of Issues at Assizes.

—— —— s. 36 - - - - 476
See Discovery of Documents.

—— —— ss. 54—59 - - - 195
See County Court Jurisdiction. 2.

—— —— s. 59 - - - - 604
See County Court Jurisdiction. 1.

—— —— s. 61 - - - 101, 311
See Citation of Heir at Law. 1, 2.

—— —— s. 70 - - - - 730
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—— —— s. 71 - - - - 654
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STATUTES—*continued.*
20 & 21 Vict. c. 77, s. 73 **183, 192, 306, 327, 388, [450, 459, 538, 594**
See Administration de Bonis non. 1.
Administration to Creditor. 2, 3.
Administration with Will Annexed. 1, 2, 3.
Foreign Probate.
Limited Administration. 2.
Renunciation of Administration.
—— —— s. 74 - - - - **1**
See Executor out of Jurisdiction.
—— —— s. 79 - - - - **303**
See Renunciation of Administration. 2.
20 & 21 Vict. c. 77, s. 83 - - - **186**
See Administration Bond. 4.
—— —— s. 87 - - - - **272**
See Inventory and Accounts.
20 & 21 Vict. c. 85, s. 16 - - - **489**
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—— —— s. 22 - - - **640, 709**
See Alimony, Permanent. 2.
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—— —— s. 23 - - - - **169**
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—— —— ss. 27, 29, 31, 43 - - **514**
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See Adultery with Person Unknown.
Leave to Proceed without Co-Respondent.
—— —— s. 30 - - - - **121**
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See Misconduct of Wife. 1.
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Discretion of Court.
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Prostitution of Petitioner.
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—— —— s. 32 - - - **78, 260**
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Order to Attend at Hearing.
21 & 22 Vict. c. 93 - - - - **328**
See Legitimacy. 3.
21 & 22 Vict. c. 95, s. 10 - - - **195**
See County Court Jurisdiction. 2.
—— —— s. 15 - - - - **272**
See Inventory and Accounts.
—— —— s. 18 - - - - **1**
See Executor out of Jurisdiction.
22 & 23 Vict. c. 61 - - - - **513**
See Evidence of Parties.
—— —— s. 4 - - - - **715**
See Custody of Children. 4.
—— —— s. 5 - **39, 231, 440, 495, 711**
See Custody of Children. 3.
Marriage Settlement. 1, 2, 3, 4.
—— —— s. 5 - - - - **648**
See Post-nuptial Settlement.

STATUTES—*continued.*
22 & 23 Vict. c. 61, s. 6 - - - **233**
See Cross-examination of Parties as to Adultery.
23 & 24 Vict. c. 144 - - - **78**
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—— —— s. 7 - - **180, 227, 505**
See Intervention of Queen's Proctor. 2.
Decree Absolute. 1.
Collusion. 2.
24 & 25 Vict. c. 114 - - **74, 673**
See Will not duly Executed.
Will, Scotch.
24 & 25 Vict. c. 134, s. 149 - - **467**
See Order to Pay Damages and Costs.
29 Vict. c. 32, s. 2 - - - - **513**
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—— —— s. 2 - - - - **365**
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SUBPŒNA—Attachment - - - **35**
See Attachment for Non-Attendance.
SUBSTITUTED EXECUTOR—Appointment **458**
See Appointment of Executor. 3.
SUIT AFTER DEATH—Nullity of marriage **559**
See Nullity of Marriage. 2.
SURETY—Justifying—Administration **12, 76, [186, 245, 287, 658**
See Administration Bond. 1, 3, 4.
Guardian of Infant. 1.
Justifying Sureties.
Protection Order.
—— Residence in Scotland - - - **85**
See Administration Bond. 5.
SURGEON IN NAVY—Will—Seamen—Passenger ship - - - - - **16**
See Will of Seaman. 1.
SUSPENSION OF PROCEEDINGS—Practice—Testamentary suit - - - **583**
See Lis alibi pendens.

TESTAMENTARY CAPACITY.] If disease be once shewn to exist in the mind of a testator, it matters not that it is discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, or that the subject on which it is manifested has no connection whatever with the testamentary disposition before the Court, the testator must be pronounced incapable. A diseased state of mind once proved to have established itself will be presumed to continue, and the burthen of shewing that health has been restored falls upon those who assert it. The tests of mental disease considered. The question of insanity is a mixed one, partly within the range of common observation, and partly within the range of special medical experience, and it is the office of the Court, in searching for a conclusion, to inform itself of the general results of medical observation, and to make a comparison between the sayings and doings of the testator at the time when the disease is alleged to exist; and, first, his sayings and doings at a time when he was sane, or the sayings and doings of those sane persons whose

TESTAMENTARY CAPACITY—*continued.*
general temperament and character bear the closest resemblance to his own; and, secondly, the sayings and doings of insane persons. Smith *v.* Tebbitt - - - - - - 398
—— Insane delusions—Evidence - - 344
See Costs out of Real Estate.

TESTAMENTARY DEEDS OF GIFT.] A deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until after his decease. Probate was granted of the three deeds, as together containing the will of the deceased, to the trustees, as legatees in trust. In the Goods of Morgan. 214

TESTAMENTARY PAPER—*Agreement not Revocable, and taking immediate Effect.*] An agreement for a seven years' lease, duly executed and attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application:—*Held*, that as no part of the agreement was revocable, and as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper. —*Quære*, whether the Court can grant probate of an instrument of which a part only is testamentary. In the Goods of Robinson - - 384

2. —— *Codicil—Will not forthcoming—Revocation of Codicil—Independent Testamentary Paper.*] The deceased duly executed a will, and subsequently a paper, which purported to be a codicil to his last will and testament. This codicil referred to a bequest not contained in the will, but in a deed of gift executed after the will and before the codicil. On the death of the deceased the will was not forthcoming:—*Held*, that as the codicil was not revoked by any of the modes indicated by the statute 1 Vict. c. 26, it remained in full force and effect, and was entitled to be admitted to proof. Black *v.* Jobling. - 685

3. —— *Condition — Validity dependent upon the option of an Individual.*] The testator wrote a codicil with his own hand, which concluded as follows:—"I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary":—*Held*, that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate. In the Goods of Smith. - - - - - - 717

4. —— *Deed falsely described as Will—Revoking Clause in Testamentary Paper disposing of no Property—Practice.*] A reference in a duly executed testamentary paper to a document as a will which is not of a testamentary character, is not alone sufficient to entitle such document to probate as a will. A testamentary paper containing a clause of revocation of any testamentary papers is entitled to probate, although it does not purport to dispose of any property, and there is no evidence of the existence of any previous testamentary papers. In the Goods of Hubbard. - 53

5. —— *Execution — Signature not made or acknowledged in the presence of Witnesses.*] On the death of the deceased a testamentary paper was found in his handwriting and with his signature at the foot or end. It had also an attestation clause and the names of two witnesses thereto. At the time of execution the deceased did not refer to the paper as a will, nor was there any evidence that the deceased's signature was on the paper at that time.—The Court refused, on motion, to grant probate of such paper as a codicil to the will of the deceased. In the Goods of Swinford - - - - - - 630

6. —— *Intention of Testatrix.*] A duly executed paper in these terms: "I wish my sister to have my bank-book for her own use," was held to be testamentary, the Court being satisfied on the evidence that the deceased, at the time of its execution, intended it to take effect after her death, and not as a present deed of gift. Cock *v.* Cooke - - - - - - 241

7. —— *Several Sheets—One Sheet only attested.*] A testatrix wrote three separate lists of legacies on three separate sheets of paper, the first of which was headed "Codicil to the will of S. P." She signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents of the three papers to connect them with each other, and the first which was attested being complete in itself, the Court refused to grant probate of the two which were unattested. In the Goods of Pearse. - - - - - - 382

9. —— *Two Wills—Grant to all the Executors named therein.*] Where probate is granted of two or more testamentary papers, as together containing the last will of the deceased, it is the practice to make the grant to all the executors named in the several papers. In the Goods of Morgan 323
TIME—Appearance - - - - 266
See Time for Appearing.
—— Desertion by husband - - - 331
See Desertion by Husband. 1.

TIME FOR APPEARING— *Practice—Rule* 28 — *Motion as to Mode of Trial.*] If a respondent does not enter an appearance within the time (generally eight days) named in the citation, the petitioner can move for directions as to the mode of trial without waiting for the expiration of the time (twenty-one days) allowed by the 28th Rule for filing an answer. Wood *v.* Wood - 266

TIME FOR APPLICATION—Settlement of damages—Decree absolute - - 168
See Decree Absolute. 2.

TRIAL—Costs—Jury discharged without verdict [467
See Order to Pay Damages and Costs.
—— Practice—Restitution of conjugal rights [568
See Restitution of Conjugal Rights. 3.

TRIAL BY JURY—Practice—Legitimacy Declaration Act, 1858 - - - 23
See Legitimacy. 2.

TRIAL OF ISSUES AT ASSIZES—*Order as to Mode of Trial*—20 & 21 *Vict. c.* 77, *ss.* 35 & 38—17 & 18 *Vict. c.* 125, *s.* 1—*Trial without Jury Practice.*] The Court of Probate has no power to order the issues in a testamentary cause to be tried by a judge of assize without a jury. Bushell *v.* Blenkhorn - - - - - 89

UNDUE INFLUENCE—Persuasion is not unlawful, but pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment of a testator, will constitute undue influence, though no force is either used or threatened. Hall *v.* Hall - - - 481

—— Will—Opposition - - - 194
See Unsuccessful Opposition to Will. 4.

UNSUCCESSFUL INTERVENTION—Queen's Proctor—Costs - - - - 180
See Intervention of Queen's Proctor. 2.

UNSUCCESSFUL OPPOSITION TO WILL—*Costs.*] The Court refused to condemn in costs a next of kin who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, the testator's medical attendant, to the effect that when the will was read over the testator signified his approval of it by gesture only, and that he could not swear that the testator was of sound mind. Tippett *v.* Tippett - 54

2. —— *Costs—Contentious Rule* 41.] If the party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by Contentious Rule 41, and the question of costs is left to the discretion of the Court. An attesting witness to a codicil signed a written statement to the effect that it was not duly executed; and it was opposed upon that statement.—The Court being of opinion that the statement had been unfairly obtained from the witness by the party opposing the codicil condemned her in the costs. Bone *v.* Whittle - - - - - 249

3. —— *Costs—Knowledge and Approval of Contents.*] A testatrix during her last illness made a will in favour of two persons who were strangers in blood. The will was in accordance with her previously expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, and it was not read over to her, and its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness:—*Held*, that there was evidence that the testatrix knew and approved of the contents of the will, and it was pronounced for; but the costs of the unsuccessful opposition of the next of kin were allowed out of the estate. Goodacre and Taylor *v.* Smith 359

4. —— *Costs—Notice under Rule* 41*—Plea of Undue Influence.*] The 41st Contentious Business Rule, which protects a person opposing a will against condemnation in costs, if he gives notice with his pleas that he merely insists upon the will being proved in solemn form, and only intends to cross-examine the witness produced in support of it, does not apply to a case in which undue influence, or any plea other than a traverse of the declaration, is pleaded. Ireland *v.* Rendall 194

5. —— *Costs—Plea of Undue Influence.*] It is not an invariable rule that the unsuccessful opponent of a will who has pleaded undue influence will be condemned in costs.—The Court refused to condemn a next of kin in costs, although he had pleaded undue influence, being of opinion that, under the circumstances of the case, the plea was not an unreasonable one. Smith *v.* Smith [239

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VERDICT OF JURY—*Suit for Dissolution—Adultery of Petitioner and Respondent proved—New Trial offered to Petitioner and refused—Decree nisi—20 & 21 Vict. c.* 85, *s.* 31—*Discretion.*] In a suit for dissolution of marriage which was tried before the Judge Ordinary and a special jury, the jury found that the respondent had committed adultery with the co-respondent, and that the petitioner had committed adultery also, but they declined to answer with whom or in what place, or whether or not it was with the knowledge and consent of the respondent. The co-respondent having obtained an order for a new trial, the Court signified that the petitioner might also have a new trial on the question of his adultery, but he refused it.—The Court declined to exercise its discretion under the 20 & 21 Vict. c. 85, s. 31, on the ground that the evidence of the petitioner's adultery was insufficient, and the verdict thereon unsatisfactory, and to make a decree nisi notwithstanding the verdict. Barnes *v.* Barnes - - - 572

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WILL ANNEXED, ADMINISTRATION WITH: *See* ADMINISTRATION WITH WILL ANNEXED.

WILL DESTROYED—*Evidence as to Execution—Dependent relative Revocation — Presumption of Revocation—Evidence insufficient to rebut Presumption.*] The only person present at the making of a will swore that it was not duly executed. The will was afterwards destroyed. Although there was reason to suspect that the will was duly executed notwithstanding the evidence, the Court declined to pronounce on that mere suspicion for a will not in existence. The presumption that a will which was in the testator's custody until his death, and could not then be found, was destroyed by the testator with the intention of revoking it, must prevail unless it is rebutted by clear and satisfactory evidence. Where the only evidence to rebut that presumption and to establish a case of dependent relative revocation was given by a witness who was interested in setting up an earlier will, and whose conduct threw doubts upon his credibility, the Court refused to act upon his evidence, although it was uncontradicted, and held that the will was revoked. ECKERSLEY *v.* PLATT [281

2. —— *Intention to revive Will of earlier date — Evidence — Declaration after Destruction of Will.*] A testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she destroyed the will with the intention that a former will should take effect.—The Court on motion refused, under the circumstances, to grant probate of a draft of the destroyed will. IN THE GOODS OF WESTON - - - - 633

WILL NOT DULY EXECUTED—*Document endorsed on back of Will, headed 2 Codicil, and executed in accordance with the Form but not valid by the Law of the Country where made—Confirmation—Foreign Law—24 & 25 Vict. c. 114.*] The deceased wrote on the back of his will, which was not duly executed, a document headed "2 codicil." This document, although it was properly executed according to the law of the country where made, could not by that law have an independent existence, or establish the will by reason that it was endorsed upon the will and referred to it:—*Held*, that neither the will nor codicil could be admitted to probate.—In determining the question what papers are testamentary under the provisions of the statute 24 & 25 Vict. c. 114, the Court will have regard to the law of one country only, and will not mix up the legal precepts of different countries. PECHELL *v.* HILDERLEY - - 673

WILL OF MARRIED WOMAN—*Administration—Executrix—Residuary Legatee—Will of Feme Covert under a power—Limited Probate—Cæterorum Grant—Chain of Representation—Grant de bonis non.*] A. died leaving a will, in which he named B. his wife his sole executrix and residuary legatee. She proved the will, and afterwards married, and having during her second coverture made a will under a power, appointing C., her daughter by her first husband, her sole executrix and residuary legatee, died, leaving her second husband and C. her surviving. Upon her death, C. took limited probate of her will, and afterwards, on the renunciation and with the consent of B.'s second husband, who had assigned to her all his interest in the residue of his wife's estate, administration of the rest of her personal estate:—*Held*, that C., as administratrix of the rest of the

WILL OF MARRIED WOMAN—*continued.*

personal estate of B., was entitled to administration of the unadministered personal effects of A. In the Goods of Richards - - - 156

2. —— *Limited Probate.*] A married woman, who clearly had power under a settlement to dispose of some part of her property, executed a will purporting to dispose of the whole of it.—The Court, without deciding whether or not it was a valid disposition of the whole of the property, made a grant of probate, limited to such property as she had power to dispose of. In the Goods of De Pradel - - - - - - 454

3. —— *Power—Testatrix domiciled Abroad—Will invalid by law of Domicile.*] A will made in Scotland in the English form by a married woman domiciled in Scotland, purporting to be made under a power and disposing of property in England, *held*, on the authority of *In the Goods of Alexander* (29 L. J. (P. M. & A.) 93), to be entitled to probate, although not valid according to the law of Scotland:—*Quære*, whether the decision in *In the Goods of Alexander* be right. In the Goods of Hallyburton - - 90

4. —— *Power—Revocation by Will made during second Coverture—1 Vict. c. 26, s. 20.*] A will made by a woman, previous to her second coverture, under a power contained in a settlement executed in contemplation of her first marriage, or during her first coverture, may be revoked by another will or codicil, or by some writing declaring an intention to revoke, and executed like a will, or by destruction with the intention of revoking, during her second or any subsequent coverture, although no power of revocation was reserved by the settlement, and no settlement was made on the second or subsequent marriage. Hawksley *v.* Barrow - - - 147

5. —— *Power—Subsequent Marriage—Later Will not revoking first Will—1 Vict. c. 26, s. 18.*] A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions. Nor is a will made in the exercise of a power of appointment revoked by a subsequent marriage, when in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions. A married woman executed a will in pursuance of a power therein recited, leaving all the property comprised in the power to her son. By a later will containing no recital of a power, and no words of revocation, she left all her property to her son. She was possessed of property other than that appointed by the first will, on which the second will could operate. Both the wills were included in the probate, as together containing the last will of the deceased. In the Goods of Fenwick - 319

6. —— *Power—Will executed before creation of Power—Bonâ fide question as to existence of Power—Limited grant with Will annexed.*] When the Court is satisfied that a bonâ fide question as to the existence of a power enabling a married woman to make a will is intended to or may be raised, it will grant a limited probate of such will, to enable the question as to the existence of the power to be determined by the Court of Chancery. Where A., being covert in 1844, and having at that time no power to make a will, executed a will, disposing of all property to which she was or ever might become entitled, and certain powers to make a will were given to her by the wills of two persons who died subsequently to the execution of the will of 1844, and by a deed of separation executed in 1850, and an application for administration with the will of 1844 annexed was opposed on the ground that the will, being invalid at the date of its execution, could not be made valid by the subsequent acts of third parties:—*Held*, that this was a question to be determined by the Court of Chancery, and that a limited grant might go as prayed. Paglar *v.* Tongue - - - - 158

WILL OF PROPERTY ABROAD.] A will disposing only of property in a foreign country is not entitled to probate in this country. In the Goods of Coode - - - - - 449

WILL OF REALTY ONLY—*Appointment of Executor—Equitable Conversion—Practice.*] A will limited to the disposition of real property only is not entitled to probate, although it contains the appointment of an executor, and the real estate is given to such executor, with directions to convert the same into personal estate. In the Goods of Barden - - - - - 325

2. —— *Appointment of Executor—Renunciation of Executor—Grant of Administration with Will annexed.*] A will disposing of realty only, but containing an appointment of an executor, is entitled to probate notwithstanding the renunciation of the executor. In the Goods of Elizabeth Jordan - - - - - 555

WILL OF SEAMAN—*Surgeon in the Navy—29 Car. 2, c. 3, s. 23; 1 Vict. c. 26, s. 11—Will made on a Passenger Ship.*] A surgeon in the navy was invalided at a foreign station, and wrote a letter at sea on board a steam-ship, on which he was a passenger homewards, containing directions as to the manner in which he wished his property to be disposed of:—*Held*, first, that a surgeon in the navy was a mariner or seaman within the provisions contained in 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, exempting mariners or seamen, being at sea, from making formal wills. Secondly, that although the deceased was not on duty at the date of the letter, yet, as he was returning from service, this will was entitled to probate, as made at sea. In the Goods of Saunders - 16

2. —— *Will made on board a Man of War in Portsmouth Harbour—1 Vict. c. 26, s. 11.*] A will made by a mariner serving on board H. M. S. *Excellent* whilst she was permanently stationed in Portsmouth harbour, was held to be the will of "a mariner or seaman being at sea," and within s. 11 of 1 Vict. c. 26. In the Goods of M'Murdo [540

WILL ON CONTINGENCY.] A will commencing with the words "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c.:—*Held*, not to be con-

WILL ON CONTINGENCY—*continued.*
tingent upon the event of the testator's death on the journey he was about to take when the will was executed. In the Goods of Dobson - 88

2. —— A will in these words: "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina*, to the floating hospital ship *Berwick Walls*, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will and bequeath," &c.:—*Held*, not to be contingent on the event of the testator's death in the illness from which he was suffering when the will was made. In the Goods of Martin - - - - - - 380

WILL, SCOTCH—*Subsequent Scotch Marriage—English Domicile at time of Death—24 & 25 Vict. c. 114.*] A domiciled Scotchman made a will and afterwards married in Scotland. He subsequently acquired an English domicile which he retained until his death:—*Held*, that, as the will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicile, and was entitled to probate in England. In the Goods of Reid - - - - - - 74

WILL UNDER POWER—*Revocation by Marriage—Person Entitled as Next of Kin—1 Vict. c. 26, s. 18.*] By the will of A., a power was given to B. under certain circumstances to dispose by will of certain property, and in default of her appointment, the property was to devolve on the person or persons who, at her decease, should be her next of kin. B., in pursuance of such power, executed a will in favour of a person whom she afterwards married, but who died in her lifetime:—*Held*, that the personal estate appointed by the will of B, would not, in default of such appointment, have passed to the person entitled as her next of kin under the Statute of Distribution; and, consequently, that her will was not revoked by her subsequent marriage. In the Goods of McVicar [671

—— Married woman 90, 147, 158, 156, 319, 454
See Will of Married Woman. 1, 2, 3, 4, 5, 6.

WITHDRAWAL OF PETITION — *Dissolution of Marriage—Wife's Answer alleging Desertion and praying a Judicial Separation — Terms — Co-respondent.*] Where a husband petitions for a dissolution of marriage on the ground of his wife's adultery, and she in her answer prays for a judicial separation on the ground of desertion, the Court will not at the husband's instance (the wife opposing) terminate the suit by dismissing the petition. Schira *v.* Schira - - - 466

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—— "Foot or end" - - - - 209
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—— "Mariner or seaman being at sea" - 540
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—— "Sole" - - - - - 628
See Revocation of Appointment of Executor.

WORDS CARRYING RESIDUE — *Will — Construction — Interlineations — Presumption.*] The words "What is left, my books and furniture and all other things, I wish to be equally divided amongst the three children," held sufficient to carry the residue. A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether the interlineations were there or not.—The Court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate. In the Goods of Ann Cadge - - - 543

WRONG DATE—*Will—Probate granted—Alteration of the Date—Endorsement.*] The Court may order a memorandum to be endorsed on a probate after it has issued, as to the true date on which a will was executed, if satisfied that the date given in the probate is erroneous. In the Goods of Allchin - - - - - 664

END OF VOL. I.

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